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Supreme Court, U.S.
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No. 08-395 SEP 24 2008

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In the

Supreme Court of the United States

KAREN STAMP,

Petitioner,

v.

METROPOLITAN LIFE, Metropolitan Life Insurance Company of America Administrator-Benefits; EXXON MOBIL OIL CORPORATION; EXXON MOBIL OIL COPORATION, Exxonmobil Benefit Plan; MOBIL OIL CORP., Life Insurance Protection Plan of Mobil Oil Corporation; MOBIL OIL CORP., Life Insurance Plan of Mobil Oil Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an accidental death claim arising out of intoxication is a "loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault" but is an "accident" within the plain meaning of the terms and provisions of an insurance policy written and issued and as contemplated by ERISA.

What is the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous; that is, that of a de novo review or of contra proferentum.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner Karen Stamp makes the following disclosure:

Karen Stamp is an individual and therefore this document is not being filed by or on behalf of a nongovernmental corporation

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II. The First Circuit Court of Appeals erred in its analysis by determining that death resulting from driving under the influence of alcohol was

"likely"" to result, in view of the case law which refutes this interpretation and statistical evidence set forth within the record demonstrating the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%, or approximately One (1) in One Hundred (100). 21

III. The Court should articulate and determine that the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous, is that of a de novo review and of contra proferentum, not that invoked by the First Circuit Court of Appeals, which ostensibly involves "a more abstract inquiry—the construction of someone else's construction" . 23

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PETITION FOR WRIT OF CERTIORARI

Now comes Karen Stamp and hereby respectfully petitions the Supreme Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated June 30, 2008.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the First Circuit, dated June 30, 2008, is unpublished, but unofficially reported at, at 063008 FED1, 07-1061 and is reproduced at App. A., 1a – 36a.

The Decision and Order and Final Judgment of United States District Court for the District of Rhode Island, dated December 13, 2006 is officially reported at 466 F.Supp.2d 422 (D. R.I. 2006) and is reproduced at App. B, 37a-61a.

JURISDICTION

The opinion and judgment of the U.S. Court of Appeals for the First Circuit sought to be reviewed was entered on June 30, 2008. This petition is timely under 28 U.S.C. § 2101 (c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U. S. Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. This Court has subject matter jurisdiction over the current matter pursuant to 28 U.S.C. § 1331 and § 1332, as her claims under the Employees Retirement Income Security Act ("ERISA") are cognizable under and including but not limited to 28 U.S.C. § 1332 (e) (1).

STATEMENT OF THE CASE

This petition arises out of the First Circuit Court of Appeal's affirmation of the denial of the claim of Karen Stamp, the wife of the late Stephen Stamp, relative to claim(s) asserted for Basic Life Insurance, Basic Life Insurance AD&D Accidental Death & Dismemberment ("AD&D"),Voluntary Basic Accidental Death & Dismemberment ("BAD&D"), and Occupational Accidental Death & Dismemberment ("VD&D") as the designated beneficiary of an employee benefit plan issued to Mobil Oil Corporation, the employer of her late husband, by Metropolitan Life Insurance Company (also referred to herein as "MetLife"). Under the provisions of the policy, Metropolitan Life Insurance Company, is designated as claims fiduciary, and the appellate claims process is administered by Exxon Mobil Chemical Company/Mobil Oil Corporation (also referred to herein as "Exxon/Mobil,"), under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq.

The group policy issued by MetLife to Exxon Mobil, delivered and governed by the laws of the Employees

Retirement Income Security Act ("ERISA"), provided Basic Life Insurance, Basic Life Insurance AD&D Accidental Death & Dismemberment ("AD&D"), Basic Accidental Death & Dismemberment ("BAD&D"), and Occupational Accidental Death & Dismemberment ("VD&D") benefits to employees of Mobil and their intended beneficiaries including Mrs. Stamp. (App. A, 3a, 6a-7a, App. B41a-45a)

On August 3, 2002, Stephen Stamp, while and traveling from and after attending an Exxon Mobil sponsored event, as a representative of management of Exxon Mobil, died as the result of an automobile accident. Metlife voluntarily paid Mrs. Stamp's claim for Basic Life Insurance benefits in September, 2002. Although Mrs. Stamp filed a claim for Basic Life Insurance AD&D, Accidental Death & Dismemberment ("AD&D"), Voluntary Basic Accidental Death & Dismemberment ("BAD&D") and Occupational Accidental Death & Dismemberment ("VD&D") benefits under the policy issued by Metlife, delivered and governed by the laws of ERISA, and has presented evidence demonstrating entitlement to said benefits, MetLife denied Mrs. Stamp's claim.

More specifically, MetLife denied the claims, premised upon the sole and specific policy provisions and exclusions, which are as follows:

> **"Accidental Death and Dismemberment Provision**
>
> Your contributions to Basic Life Insurance coverage also provide accidental death and dismemberment coverage equal to the amount

of your Basic Life Insurance coverage If you are physically injured as a result of an accident and died within 90 days as a result of that injury or accident, your designated beneficiary will receive the full amount of your accidental death and dismemberment benefit as well as your normal benefit under the Basic Life Insurance.

Exceptions

No AD&D payment will be made for death...caused by...intentional self destruction or intentionally self-inflicted injury...

"Voluntary Accidental Death and Dismemberment Insurance Coverage

As described in Section 2, your Basic Life Insurance coverage includes accidental death and dismemberment coverage of an additional two times annual life insurance pay. If you want a higher level of AD&D coverage... you may elect this coverage in whole multiples on one to eight times annual life insurance pay through Voluntary AD&D insurance."

No other policy provisions or exclusions were cited by or relied upon by Metlife in denying the claims asserted by Mrs. Stamp. Although self-explanatory, the substantive denial of these claims by Metlife was premised upon an apparent finding that:

"In the State of Rhode Island, a person is considered legally intoxicated and incapable of operating a motor vehicle if the blood alcohol

> level is .08 percent or higher. This is because alcohol impairs the drinker's judgment and physical and mental reactions. Here Mr. Stamp's blood alcohol level was over three times the legal limit. The mental and physical impairments caused by excess of alcohol consumption are intentionally self-inflicted injuries that caused the death. In addition, the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan". (App. B 44a-45a).

The Metlife policy does not contain any specific exclusionary language for injuries and/or death resulting from intoxication. Finally, no specific plan provisions were cited by Metlife to support its proposition that "the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan". Mrs. Stamp appealed Metlife's denial of the claim to Exxon Mobil on July 20, 2004. Exxon Mobil by correspondence of October 15, 2004, denied Mrs. Stamp's appeal. (App.B, 44-45a)

Under the claim asserted for Basic Life Insurance, Basic Life Insurance AD&D Accidental Death & Dismemberment benefits, Exxon Mobil based its denial on the premise that "by intentionally consuming an excessive amount of alcohol, Mr. Stamp inflicted in injury upon himself. The term injury is normally understood to include physical or mental harm. In this case, Mr. Stamp's alcohol consumption caused a serious (albeit temporary) impairment of his mental and physical capacity to function. This injury caused

his death". As to Mrs. Stamp's claim for Voluntary Basic Accidental Death & Dismemberment benefits, Exxon Mobil denied the claim because the accident which caused Mr. Stamp's death was not "accidental", and that his death was a self-inflicted injury based upon the plan exclusion which reads that "no voluntary AD&D payment will be made for death or loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault". Exxon Mobil concluded that "Mr. Stamp was committing a serious crime within the meaning of the plan". (App.B, 44a-45a)

Finally, as to Mrs. Stamp's claim for Occupational Accidental Death & Dismemberment benefits, Exxon Mobil concluded that Mr. Stamp's accident and resulting death was not "accident" or an "occupational accident" as the collision did not occur "while at work". After hearing on the Defendants joint motion for summary judgment and Plaintiff's cross motion for summary judgment, the District Court for the District of Rhode Island granted the Defendant's joint motion for summary judgment. (App. B. 61a-62a) The First Circuit, in a majority opinion, affirmed the summary judgment against the plaintiff on June 30, 2008. (App. A 1a)

REASON(S) FOR GRANTING PETITION

The Court has never resolved the conflict between the various Circuit Courts of Appeals in determining whether unintentional conduct by an insured participant while intoxicated is "accidental" or "intentional" conduct pursuant to the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C.

§ 1001, et seq.. There presently exists a wide conflict between the Circuit Courts of Appeals, and the law remains unsettled in this regard among jurisdictions pursuant to ERISA. This continued uncertainty alone justifies review. Calhoon v. Harvey, 379 U.S. 134, 137 (1964) (granting *certiorari* because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980) (*certiorari* granted "to forestall a possible conflict in the lower courts" on an "important" issue even though there was no "direct conflict" among various district court and court of appeals opinions). Additionally, as this Court recently determined, albeit in a different context, as was pointed out in the vigorous dissent by Justice Torruella, "DUI... involves "accidental or negligent conduct". Begay v. United States, 128 S. Ct. 1581, 1587 (2008).

The First Circuit Court of Appeals also misapplied its own decision in Wickman v. Northwestern National Insurance Co., 908 F.2d 1077 (1st Cir. 1990), which requires a determination whether, under the circumstances, there was any objective expectation of death or injury, in which the Court must query whether a reasonable person, with a background and characteristics similar to the insured, would have viewed the injury as highly likely or substantially certain to occur as a result of the insured's conduct. In this instance, the First Circuit Court of Appeals determined that Mr. Stamp engaged in "risky conduct", and that injury could be the "likely outcome" of such "risky conduct", which is not the appropriate standard, and failed to determine that Mr. Stamp's fatal injuries were objectively highly likely or

substantially certain to occur as the result of his intoxication.

Finally, this Court should articulate and determine that the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous, is that of a de novo review and of contra proferentum, not that invoked by the First Circuit Court of Appeals, which ostensibly involves "a more abstract inquiry—the construction of someone else's construction" (App. A. 21a)

I. An accidental death claim arising out of intoxication is not a "loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault" but is an "accident" within the plain meaning of the terms and provisions of the insurance policy written and issued by Metropolitan Life Insurance Company to Mobil Oil Corporation and as contemplated by ERISA.

In analyzing whether a death or injury under an ERISA insurance policy is "accidental" or is otherwise an "intentionally self-inflicted injury", the various Circuit Courts have invariably relied upon the decision rendered by the First Circuit in Wickman v. Northwestern Nat'l Ins. Co., Id., See also King ex rel. Schanus v. Hartford Life and Accident Ins. Co., 357 F.3d 840 (8th Cir. 2004); Padfield v. AIG Life Ins. Co. of

Am., 290 F.3d 1121(9th Cir. 2002); West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001); Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997); Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995).

These Courts have clearly held that "generally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments". The majority of the Circuit Courts of Appeals have consistently held that a death is deemed "accidental" under a group accidental insurance policy established under ERISA if the death or injury was unexpected or unintentional. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990), et al, ***Couch on Insurance*** § 139:16 (3d Ed. 1995 and 2000 Supp.).

These Court(s) have adopted an analytical process for determining whether a death or injury was an "accident", initially based upon a determination of the insured's subjective expectation of death or injury. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990)

In the event that an analysis of the facts support a determination that the insured subjectively lacked any expectation of death or injury, an analysis must be undertaken so as to determine whether under the circumstances there was any objective expectation of death or injury. This entails an objective analysis of the insured's expectations under the circumstances. In this analysis, one must ask whether a reasonable person, with a background and characteristics similar to the insured, would have viewed the injury as highly

likely or substantially certain to occur as a result of the insured's conduct. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990), et al.

In this instance, the First Circuit Court of Appeals, misapplied its own Wickman analysis, insofar as the record clearly revealed that Mr. Stamp had no subjective expectation whatsoever of death or injury on August 2, 2002, contrary to the opinion of the First Circuit Court of Appeals. As the dissent in the First Circuit correctly pointed out "there is no evidence that Mr. Stamp's actions were the result of anything but misjudgments, not intentional actions." (App. A, 27a)

It is without dispute in the underlying record that Mr. Stamp telephoned Mrs. Stamp at approximately 5:20 P.M. on Friday, August 2, 2002, when they discussed the events of the Exxon Mobil meeting. Mr. Stamp was in good spirits, had had a "good day", saying that the weather had been "great", and that he enjoyed the boat cruise. Mrs. Stamp also indicated that he was in the process of changing his clothes to attend the business dinner at a hotel across the street from where the boat had docked. Mr. and Mrs. Stamp also confirmed their previous plans that he would stay at his parents' home in his hometown of Johnston, Rhode Island that evening since they were to attend a family gathering on Saturday, August 3, 2002, for his brother's 40th birthday. At no time during his discussion with his wife on Friday, August 2, 2002 did Stephen Stamp appear impaired; to the contrary, he sounded in good spirits, and indicated that he had had a "good day" during the day-long meeting, and was looking forward to the events of the following day. This information is verified by that provided by Exxon

Mobil and, indeed, Exxon Mobil conceded that "I think it's not clear that a drunk driver even at .24% BAC (blood-alcohol content) level is "highly likely" or "substantially certain" to die...I'm not willing to assert that intoxicated driver is "highly likely" to die." (App. B 37a-38a)

The records reveals that during the afternoon boat cruise, Mr. Stamp was in a good mood, and told other Exxon Mobil management personnel that he was going to Rhode Island the next day, and that "his wife and daughter will going to meet him there the next day and he hoped to get together with his friends, who he didn't often see, that night, but wasn't sure whether that would work out". This is consistent with that provided by Mrs. Stamp and Mr. Kingsley concerning Mr. Stamp's future plans for that night and the following morning. (App. B, 39a)

Even more critical are the observations of Mr. Stamp's Exxon Mobil's co-workers concerning Mr. Stamp during the events of August 2002. During the boat cruise, Mr. Stamp was in a good mood, and showed no signs of intoxication.

Although Mr Stamp consumed several drinks during the course of the day at the meeting and at the Exxon Mobil Company dinner, there is absolutely no evidence that Mr. Stamp was impaired. To the contrary, in response to the question raised by Exxon Mobil "What was Mr. Stamp's condition when he left?", it is conceded that "BJ (B.J. Welch) and Rick (Rick Turner) say he (Mr. Stamp) showed no signs of impairment Since BJ has worked as a bouncer in a nightclub, his comments seem particularly well-

informed. He said Mr. Stamp's speech was normal and his thoughts seemed coherent. He showed no unsteadiness and seemed alert. Rick agrees with this assessment". (App. B, 39a-40a)

This is consistent with that provided by Mrs. Stamp and Mr. Kingsley concerning their impression of Mr. Stamp's condition before and after the Exxon Mobile meeting. Clearly Mr. Stamp had no subjective expectation of death or injury subsequent to the Exxon Mobil meeting. No reasonable conclusion could be drawn otherwise based upon the record. (App. B, 39a-40a)

In conformance with Wickman, The First Circuit Court of Appeals' analysis as to whether, under the circumstances, there was any objective expectation of Mr. Stamp's death, was erroneous. Such an analysis by the First Circuit Court of Appeals should have entailed an objective analysis of Mr. Stamp's expectations under the circumstances, and which whether a reasonable person, with a background and characteristics similar to Mr. Stamp, would have viewed the injury as highly likely or substantially certain to occur. Based upon the record, it was unreasonable for the Court to reach the determination that a reasonable person would have viewed Mr. Stamp's unfortunate death as either "highly likely" or "substantially certain" to have occurred as the result of his activities on August 2, 2002.

As the District Court itself determined, there was no indication to Mr. Stamp's wife, his friend Joseph Kingsley, or any of his Mobil co-employees, based upon their observations and communications with Mr.

Stamp, that would have led anyone to form the impression that it was "substantially certain" that Mr. Stamp would have been injured or killed as a result of a car accident. To the contrary, Mr. Stamp was not impaired, was in a good mood, had enjoyed the events at the Exxon Mobil meeting, was making plans to perhaps meet a friend later that evening, and was looking forward to meeting his wife and daughter at the family gathering the next day. (App. B 37a-40a) The only reasonable determination which can be drawn is that no objective person would have viewed Mr. Stamp's death as "highly likely" or "substantially certain" to have occurred.

Courts in other jurisdictions applying the Wickman analysis have consistently held that a death is deemed "accidental" under accidental death and life insurance policies established under ERISA under the same or similar circumstances as present in this instance.

In King ex rel. Schanus v. Hartford Life and Accident Insurance Co., 357 F.3d 840 (8th Cir. 2004), the decedent was killed as the result of a motorcycle accident in which he was not wearing a helmet, was driving at an excessive rate of speed, and had a blood alcohol content of twice the legal limit. The Hartford Life and Accident Insurance Company ("Hartford") denied the beneficiaries' claim based upon the "intentional self-inflicted injury" exclusion of the ERISA accidental death insurance policy based upon the decedent's intoxication.

The Eighth Circuit Court of Appeals, in applying the Wickman analysis, while acknowledging the possible dangers of driving while intoxicated, indicated

that a person is far more likely to be arrested for driving while intoxicated than to die or to be injured in an alcohol-related automobile crash, and far more likely to arrive home than to be either arrested, injured or killed". The court indicated that subjectively the decedent intended to come home safely, and a reasonable person in the shoes of the insured would not have viewed the crash and subsequent death as "highly likely to occur". Accordingly, the Eighth Circuit Court of Appeals found that the decedent's death was "accidental" and thus covered under the applicable accidental death insurance policy. King ex rel. Schanus v. Hartford Life and Accident Ins. Co., 357 F.3d 840 (8th Cir. 2004).

In circumstances similar to that involving Mr. Stamp, in West v. Aetna Life Insurance Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001), the decedent had attended a company party, and was killed as the result of a car accident returning home. At the time, the decedent was alleged to have had a blood alcohol content of three times the legal limit. Aetna denied the beneficiaries' ERISA accidental group death claim, on the basis that "the insured should have foreseen the consequences of drinking and operating a motor vehicle while intoxicated", and thereby relying upon the "intentionally self-inflicted injury" exclusion of the policy.

In applying the Wickman analysis, United States District Court for the District of Iowa determined that the insurers' denial was unreasonable, indicating there was no indication that the decedent could have subjectively appreciated that there was a high

likelihood or strong possibility of his death resulting from driving while intoxicated.

Additionally, from an objective standpoint, the court indicated even the evidence presented as to the level of intoxication was far from evidence upon which an objective conclusion could be drawn to injury or death while driving is "highly likely" to occur at that level of intoxication. The court also aptly pointed out that "While "common knowledge" should actually tell a person driving while intoxicated is that he or she is far more likely to be arrested for driving while intoxicated than to die or to be injured in an alcohol-related automobile crash, and far more likely to arrive home than to be either arrested, injured, or killed". The court finally stated that "while "common knowledge", media publicity, and statistics all demonstrate that driving drunk is irresponsible and dangerous, because the risks that come with it are preventable by the use of proper judgment, none of these things demonstrates that driving while intoxicated is so highly likely to result the injury or death that any other expectation is unreasonable". West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001)

The decedent in Padfield v. AIG Life Insurance Company of America, 290 F.3d 1121(9th Cir. 2002) died as the result of "autoerotic asphyxiation", which was defined as "the practice of limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure". The insurer refused to pay benefits under the accidental injury and death insurance policy governed by ERISA, on the basis that the death was caused by an "intentionally self-inflicted

injury". In adopting the rationale set forth in Wickman, the 9th Circuit Court of Appeals found that there was no subjective or objective evidence that the decedent intended to cause the injuries that resulted in his death.

In denying the insurer's arguments that the decedent voluntarily engaged in a risky activity, the court pointed out that "voluntary risky acts resulting in injury are not necessarily acts that result in "intentionally self-inflicted injury". The court also aptly quoted from Wickman, agreeing that "generally, insurance purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments" finding that the decedent did not intend to die from an intentionally self-inflicted injury, but rather, "made a fatal mistake". Padfield v. AIG Life Ins. Co. of Am., 290 F.3d 1121(9th Cir. 2002)

In a similar case involving autoerotic asphyxiation, in that of Todd v. AIG Life Insurance Co., 47 F.3d 1448 (5th Cir. 1995), AIG Life Insurance Company denied the beneficiaries' accidental death insurance claim, claiming that "a death cannot be considered accidental... if from the viewpoint of the insured, his conduct was such that he should have anticipated that in all reasonable probability he would be killed". The Court found that the decedent had no subjective intention of death and also no reasonable determination of an objective intent of death could be drawn, finding that "(decedent) had been married for many years, had two children, was planning a family vacation soon, and was building a new house". The Fifth Circuit Court of Appeals, basing its analysis on

Wickman, determined that the decedent's death resulted from an "accident" within the meaning of ERISA. Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995).

In Santaella v. Metropolitan Life Insurance Co., 123 F.3d 456 (7th Cir. 1997); the decedent passed away as the result of acute prescription drug intoxication. Metropolitan Life Insurance Company denied the resulting claim under the ERISA governed accidental death insurance policy based on the "intentionally self-inflicted injury" policy exclusion. The Seventh Circuit Court of Appeals determined that "we must conclude that the record requires the conclusion that (decedent) had a subjective expectation of survival and that such expectation was subjectively reasonable because death was not certain or even highly likely to result from her conduct... it was an accident". Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997).

The decedent in American Family Life Assurance Co. v. Bilyeu, 921 F. 2d 87 (6th Cir. 1990) was killed as the result of a one car accident after which he was observed at traveling at an estimated speed of 55 to 60 mph in a 35 mile per hour zone. It was later determined that his blood alcohol content was at least two times the legal limit. American Family Life Insurance Company denied the resulting claim on the basis of the "intentionally self-inflicted injury" policy exclusion, and argued that the decedent could have foreseen his car accident as the probable result of his intoxication". The Sixth Circuit Court of Appeals determined that the decedent's death under the circumstances was indeed "accidental" within the terms of the accidental death insurance policy,

determining that a death is accidental absent a showing that the death was the result of a plan, design or intent on the part of the decedent". Am. Family Life Assurance Co. v. Bilyeu, 921 F. 2d 87 (6th Cir. 1990).

Other state and federal courts analyzing whether a death under the same or similar circumstances is "accidental" or was otherwise an "intentionally self-inflicted injury" have reached similar conclusions. In Harrell v. Minnesota Mutual Life Insurance Co., 937 S.W. 2d 809 (Tenn. 1996), the decedent died as the result of a motor vehicle accident, after which it was determined that she had a blood alcohol level twice the existing legal limit. Minnesota Mutual Life Insurance Company denied the claim on the basis that the decedent's death was not accidental, since it was the foreseeable result of her driving an automobile under the influence of an intoxicant.

The Supreme Court of Tennessee held that the insured's death was accidental, despite her voluntary intoxication, since she did not intend or expect death to result from her driving under the influence of alcohol. Harrell v. Minnesota Mut. Life Ins. Co., 937 S.W. 2d 809 (Tenn. 1996).

In Freeman v. Crown Life Insurance Co., 580 S.W. 2d 897 (Tex. 1979), the insured was killed as the result of a motor vehicle accident, after which it was established that his blood alcohol content was at least twice the legal limit. The insured denied the resulting claim on the basis that the death was not accidental since it was the foreseeable result of driving while under the influence of alcohol.

The Court of Civil Appeals for Texas ruled otherwise, relying upon the majority rule as set forth in Appleman ***Insurance Law and Practice***, that "while drunken driving is dangerous and should be prevented, the public still regards such an accident as "accidental". The court also said that for such an incident to be not accidental, "more is required any simple showing that the insured could have reasonably foreseen that injury or death might result... unquestionably, driving while intoxicated is a serious violation of the law and an extremely dangerous act, but we do not believe it is such an act that one who commits it can be said to reasonably known that it will probably bring about his own death". Freeman v. Crown Life Ins. Co., 580 S.W. 2d 897 (Tex. 1979).

In Collins v. Nationwide Life Insurance Co., 294 N.W. 194 (Mich. 1980), the decedent died of voluntary acute alcohol intoxication, with a blood alcohol level of approximately four times the legal limit existing in Michigan. The Michigan Supreme Court indicated that where the insured died as the result of voluntary intoxication, but did not intend or expect death to result, such death was accidental for purposes of an accidental death insurance policy. The court stated that in order to defeat recovery under the policy "the insured must have intended or expected that his conduct would in all probability result in death. Negligence alone is not sufficient to prevent the death from being an accident within the meaning of the policy". Collins v. Nationwide Life Ins. Co., 294 N.W. 194 (Mich. 1980).

The decedent in Cranfill v. Aetna Life Insurance Co., 49 P.2d 703 (Okla. 2002), was killed in a one

vehicle accident, and that the same several bottles of alcohol were founded his vehicle. The time of death, the decedent's blood alcohol level was 254 mg/dL, more than 2 ½ times the legal limit for operating a motor vehicle in Colorado. The insured denied the claim for benefits under an accidental death policy on the basis that the decedent's death was not the result of an "accident" and or was "intentionally self-inflicted".

The Oklahoma Supreme Court determined that the decedent's conduct of intentionally driving while intoxicated was not the equivalent of his intent or plan to cause his death. The court concluded that a death is not intently self-inflicted for purposes of an accidental death policy merely because it resulted from engaging in negligent or even grossly negligent conduct, unless the insured intended to cause his own death. The court then stated that to hold otherwise would be contrary to the expectations of insureds that have purchased accidental death insurance to protect their beneficiaries". Cranfill v. Aetna Life Ins. Co., 49 P.2d 703 (Okla. 2002)

All of these decisions by various state and federal courts have unequivocally determined that an incident and resulting death is "accidental" under the terms and provisions of an accidental death insurance policy under circumstances where the decedent did not expect or intend for death to result. As the dissent in the First Circuit pointed out, "...those circuits that have examined insurance policy exclusions similar to the ones that issue here, using a "highly likely" or "substantially certain" standard, are the ones that have reached the correct answer to the question", determining that an accidental death claim arising out

of intoxication is not a loss caused by intentionally self-inflicted injury, but is an "accident". (App. A 25a). This conclusion is supported by this Court's recent determination that "DUI... involves "accidental or negligent conduct". Begay, 128 S. Ct. at 1587.

II. The First Circuit Court of Appeals erred in its analysis by determining that death resulting from driving under the influence of alcohol was "likely"" to result, in view of the case law which refutes this interpretation and statistical evidence set forth within the record demonstrating the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%, or approximately One (1) in One Hundred (100).

In this instance, the District Court and the First Circuit Court of Appeals erred by discounting the statistical evidence offered by Mrs. Stamp and which was obtained from the federal government which is directly to the contrary to the conclusion drawn by Metropolitan Life Insurance Company and or Exxon Mobil. The statistical evidence reveals in the year prior to Mr. Stamp's death, 1,434,852 arrests were made for driving under the influence of alcohol.

Common sense, if nothing else, makes it plain that not every intoxicated driver is arrested for driving under the influence of alcohol in any given year, let alone every time he or she is intoxicated. Additionally, statistics compiled by the United States Department of Transportation, National Highway Traffic Safety Administration, National Center for Statistics and

Analysis, revealed that in the same year, 2001, there were 42,116 fatalities resulting from motor vehicle accidents. Of these 42,116 fatalities resulting from motor vehicle accidents, 17,447 were alcohol **"related",** not necessarily concerning the operation of a motor vehicle under the influence of alcohol, which comprises 40% of the total fatalities resulting from motor vehicle accidents.

Based upon these federal governmental statistics, assuming that an arrest results every time one drives a motor vehicle under the influence of alcohol, the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%, or approximately One (1) in One Hundred (100). These statistics establishes that it cannot be reasonably concluded by either common sense or legal analysis that death resulting from driving under the influence of alcohol is either "reasonably foreseeable" as concluded by Metropolitan Life Insurance Company and Exxon Mobil, certainly not "highly likely" or "substantially certain" to result as required by established law. Indeed, Exxon Mobil conceded that "it's not clear that a drunk driver even at .24% BAC (blood-alcohol content) is "highly likely" or "substantially certain" to die. As Justice Torruella correctly pointed out in the First Circuit dissenting opinion, "given this, (statistics provided by plaintiff) it can be said that 'a reasonable person would not view death as 'highly likely' to result from driving drunk". (App A. 28a)

The First Circuit Court of Appeals in its analysis as to whether a reasonable person, with a background and characteristics similar to the insured, would have

objectively viewed the injury as "highly likely" or "substantially certain" to occur as a result driving under the influence of alcohol, erroneously equated the act of driving under the influence of alcohol with that of Russian roulette. Undoubtedly it can be said with some degree of assurance that many have unfortunately driven while under the influence of alcohol.

It can also be said with some degree of assurance that many have not engaged in the game of Russian roulette, where "the point of the game is to see if you are lucky enough to live". (App. A. 30a). As the dissent aptly pointed out, "Drunk driving is, to be sure, a foolish and reckless act...No doubt Mr. Stamp's decision to drive that while intoxicated was risky 'but voluntary risky acts resulting in injury are not necessarily acts that result in "intentionally self-inflicted injury"'. (App. A 30a, 32a), quoting Padfield v. AIG Life Ins. Co. of Am., 290 F.3d 1121 (9th Cir. 2002).

III. The Court should articulate and determine that the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous, is that of a de novo review and of contra proferentum, not that invoked by the First Circuit Court of Appeals, which ostensibly involves "a more abstract

inquiry—the construction of someone else's construction"

It is well established that the benefit provisions of an ERISA regulated group insurance program are customarily and typically interpreted under principles of federal substantive law. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 107 S.Ct. 1549, 95 L.Ed.2d39 (1987), United McGill Corp. v. Stinnett, 154 F. 3rd 1968 (4th Cir. 1998); Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990). In interpreting the benefit provisions of ERISA insurance policies, it is equally well established that Court in most instances apply the basic tenets of contract interpretation and will look to the definition in the terms of the policy contract itself. Id.

The various Circuit Courts have held that the reasonable expectations of the insured party govern the interpretation of policy terms, and no insurer can rely upon confusing policy language to put an obstacle between an injured party and the benefits provided by the policy. In reviewing plans established under ERISA, typically federal common-law rules of contract interpretation govern, in which is well established that it is required to "interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience". Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997).

When insurance plan terms are ambiguous after applying ordinary principles of contract interpretation, Courts have customarily determined that the policy terms should be construed strictly against the insurer and in favor of the insured in order to afford the

protection which the insured was endeavoring to seek when he applied for the insurance. Santaella v. Metrop. Life Insu. Co., 123 F.3d 456 (7th Cir. 1997); Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1994); Delk v. Durham Life Ins. Co., 959 F.2d 104 (8th Cir. 1992), ***Couch on Insurance 2d*** § 41:9, 13 (3d Ed. 1995 and 2000); 13 Appleman ***Insurance Law and Practice*** § 7401 at 197 (1981).

As discussed above, the First Circuit Court of Appeals indicated that "insureds' purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments". Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990).

However, the First Circuit Court of Appeals Courts in issuing its decision, failed to review the insurance plan terms to determine whether the applicable terms were ambiguous and therefore not relying upon the rule of contra proferentem, which other Courts have held is invoked only when Courts undertake a de novo review of plan interpretations. Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (7th Cir.1992).; Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir.1995). Other Courts making a deferential review of such determinations have determined no occasion to employ the rule of contra proferentem.

These Courts have held that deferential review does not involve a construction of the terms of the plan; it involves a "more abstract inquiry--the construction of someone else's construction". Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (7th

Cir.1992).; Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir. 1995).

A more reasoned approach, which the Petitioner urges the Court to adopt, in instances where the Court reviews and analyzes terms of an insurance plan established under ERISA, is to apply federal common-law rules of contract interpretation, in which the Court is required to "interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience". Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997); et al.

In this instance, Metropolitan, as any other insurer authoring policies established pursuant to ERISA, drafted the policy at issue and could have easily inserted a policy provision that explicitly excluded coverage for injuries or deaths resulting from intoxication. As the First Circuit Court of Appeals aptly itself pointed out in Wickman v. Northwestern National Insurance Co., 908 F.2d 1077 (1st Cir. 1990), terms like "accident" included within the provisions of an ERISA regulated group insurance program "should be judged from the standpoint of the insured" and that the "reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms" Id. at 1088.

Courts have clearly indicated insurers may relieve themselves of the obligation for coverage for certain injuries or deaths by inserting or including the appropriate policy exclusion. For example, in Harrell v. Minnesota Mutual Life Insurance Co., 937 S.W. 2d 809 (Tenn. 1996) as discussed above, the Supreme

Court of Tennessee correctly adopted the majority view that "Insurance companies draft the policies... and are, therefore, free to exclude injury or death that results from reckless and foolhardy acts. With simplicity and clarity of expression they may remove all doubt". Id at 814.

As the court pointed out in West v. Aetna Life Insurance Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001), "life insurance companies have ample ways to avoid judgments like this one, including insertion of an express "intoxication" exclusion into an accidental death policy". Id. at 896. In Collins v. Nationwide Life Insurance Co., 294 N.W. 194 (Mich. 1980), the Michigan Supreme Court, under similar circumstances, held that "one who purchases an accidental death policy intends to provide benefits to his beneficiary in the event that he should suffer death resulting from accident as opposed to death resulting from other means, such as suicide, disease or natural death.. Insurance policies upon which the public relies for security in case of accident should be free from fine distinctions which few can understand until pointed out by lawyers and judges". Id. at 197.

The Court of Civil Appeals for Texas also correctly stated that "there is no doubt that the ordinary person who is insured by an accident insurance policy would consider his death in an automobile collision accidental even though at the time of the collision he may be intoxicated or otherwise negligent. If the (insurer) decided to exclude from coverage any death occurring in such circumstances, it could have easily done so by inserting in the policy an appropriate exclusion".

Freeman v. Crown Life Ins. Co., 580 S.W. 2d 897 (Tex. 1979).

Terms like "accident" included within the provisions of an ERISA regulated group insurance program should be judged from the standpoint of the insured and that the reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990). As Justice Torruella pointed out in the First Circuit dissenting opinion, "accepting that Mr. Stamp had a BAC above the legal limit and that he was in a one car collision with no other evidence of why he veered off the road and hit a tree, it is fair to say that, at most, Mr. Stamp miscalculated and misjudged his ability to drive that fateful evening. He purchased insurance in order to protect himself and his family against such unforeseen accidents". (App. A. 27a)

Notwithstanding its contention in its denial of Mrs. Stamp's claim that "the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan", Metropolitan drafted the policy at issue and could have easily inserted a policy provision that explicitly excluded coverage for injuries or deaths allegedly resulting from intoxication. Its failure to do so should be strictly construed against Metropolitan in order to afford the protection and provide the benefits which Mr. Stamp was seeking when he applied for and paid for the insurance.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the First Circuit Court of Appeals.

KAREN STAMP

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1061

[Filed June 30, 2008]

KAREN STAMP,	)
	)
Plaintiff, Appellant,	)
	)
v.	)
	)
METROPOLITAN LIFE INSURANCE COMPANY; ADMINISTRATOR-BENEFITS, EXXONMOBIL BENEFIT PLAN; EXXONMOBIL CORPORATION; EXXONMOBIL BENEFIT PLAN; LIFE INSURANCE PROTECTION PLAN OF MOBIL OIL CORPORATION; and LIFE INSURANCE PLAN OF MOBIL OIL CORPORATION,	)
	)
Defendants, Appellees.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ronald R. Lagueux, U.S. District Judge]

Before

Torruella, Lipez, and Howard, Circuit Judges.

Fred L. Mason, Jr., with whom Mason Associates P.C. was on brief, for appellant.

Ian Linker, with whom Brooks R. Magratten, Catherine A. Shaghalian, and Vetter & White were on brief, for appellee Metropolitan Life Insurance Company.

Neal J. McNamara, with whom Nixon Peabody LLP was on brief, for appellees.

June 30, 2008

LIPEZ, Circuit Judge. This case requires us to determine whether the plan administrator of an employee benefits plan governed by the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, may reasonably conclude that the insured, who was killed in a one-car collision with a tree while driving with a blood alcohol content ("BAC") of three times the legal limit, did not die as a result of an "accident" for purposes of his Accidental Death and Dismemberment ("AD&D") life insurance policies. After careful review of the developing federal common law under ERISA, we uphold the plan administrator's determination that, in this case, the insured was so highly intoxicated that his death was not an "accident." In so doing, we affirm the judgment of the district court.

I.

The facts are undisputed. On August 2, 2002, Steven Stamp attended a meeting for employees of appellee Exxon Mobil Chemical Company ("Mobil") at a resort in Westbrook, Connecticut. The meeting consisted of presentations in the morning, a boat cruise in the afternoon, and dinner that evening. Mr. Stamp spoke with his wife, appellant Karen Stamp, at 5:20 p.m. and confirmed that after dinner he planned to drive to his parents' home near Providence, Rhode Island, where she and their young daughter would join him to celebrate his brother's 40th birthday the next day. Mrs. Stamp attests that he did not sound impaired during the phone call, that he "sounded in good spirits," and that he had enjoyed the meeting and cruise. Mr. Stamp consumed several alcoholic beverages during the boat cruise and at dinner, but his co-workers reported that he did not appear to be impaired or unsteady when he left the resort between 8:30 and 9:00 that evening.

At 9:20 p.m., while en route to the Providence area, Mr. Stamp placed a cell phone call to his friend Joe Kingsley, hoping to visit him on his way through Rhode Island. Kingsley declined, explaining that he needed to go to bed early. Kingsley described Mr. Stamp's mood as positive and upbeat and reported that he did not sound intoxicated.

The drive from Westbrook to Mr. Stamp's parents' house should have taken about an hour and a half. Cell phone billing records of calls placed through directory assistance at 9:51 p.m. and 9:58 p.m. indicate that Mr. Stamp was already in the Providence area at

that time, but Mr. Stamp evidently did not go directly to his parents' house. MetLife and Mobil posit that he must have stopped somewhere and consumed additional alcohol instead. As further evidence of this stop, MetLife notes that Mr. Stamp's hand had a stamp on it that read "copy." In MetLife's view, this fact indicates that Mr. Stamp went to a bar where his hand was stamped at the door.

Just after midnight, Mr. Stamp died when his car went off the road in Johnston, Rhode Island and struck a tree. At the time of his death, his BAC was .265%, more than three times the legal limit in Rhode Island.[1] The police report described the road conditions at the time of the collision as dry, the traffic as light, and there were no other adverse driving conditions.[2] The autopsy report concluded that the cause of death was "[m]ultiple injuries due to blunt force trauma," and noted "acute ethanol intoxication" as another significant finding. The report classified the manner of death as "accidental."

Mrs. Stamp, the beneficiary of her husband's life insurance policies, submitted a claim for benefits. Appellee Metropolitan Life Insurance Company ("MetLife"), acting as claim fiduciary, paid her claim for Basic Life Insurance benefits, but denied her claims for benefits from her husband's Basic and

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[1] Rhode Island criminalizes driving with a BAC of .08% or higher. R.I. Gen. Laws § 31-27-2. Increased penalties apply when the driver's BAC is greater than .15%. Id. § 31-27-2(d)(1)(ii).

[2] The police report used the term "accident scene," but it did not make any determination as to the cause of the crash.

Voluntary AD&D policies. MetLife left undetermined Mrs. Stamp's claim for benefits under an additional Occupational AD&D policy.

Mrs. Stamp submitted a timely appeal to Mobil, which, in its capacity as plan administrator, had "full and exclusive authority to make final determinations as to all issues concerning plan administration," including "discretionary and final authority to determine coverage and eligibility for benefits . . . [and] to interpret and explain the terms of the Life Insurance Program." Mobil denied Mrs. Stamp's appeal of the Basic and Voluntary AD&D benefit decisions, and rejected her claim for Occupational AD&D benefits.

The ERISA plan at issue provides that Basic and Voluntary AD&D benefits will be paid if the insured is "physically injured as a result of an accident and die[s] within 90 days as a result of that injury or accident." Occupational AD&D benefits will be paid if the insured's death occurs "within one year as a result of an injury caused by an occupational accident 'while at work.'" Mobil concluded that Mr. Stamp's death was not the result of an "accident," and therefore was not

covered by his AD&D policies.[3] The denial letter explained:

> In your appeal submission you argue that the weight of legal authority compels me to find that the collision in this case was an "accident" within the meaning of the plan. Counsel has reviewed these and other cases and advises that the weight of authority under applicable Federal law would not compel such a finding.
>
> In as much as I am not bound by law, I look to the purpose of the plan. I believe that the purpose of the plan is to protect participants from risks that are outside of their control. The risks flowing from driving while intoxicated are completely within the control of the participant. While it is true that certain behavior that increases risk (such as skiing or horseback riding) would not result in loss of coverage, [driving while intoxicated] can be distinguished because it unreasonably increases the risk associated with a normally safe activity by interfering with an individual's ability to perceive and respond to risk. To impose the

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[3] Mobil further determined that: (1) Mr. Stamp's death was caused by an "intentionally self-inflicted injury," and thereby excluded from coverage by the terms of the Basic and Voluntary AD&D policies; (2) Mr. Stamp was committing a "serious crime" when the collision occurred, excluding coverage under the terms of the Voluntary and Occupational AD&D policies; and (3) the collision did not occur "while at work" for the purposes of the Occupational AD&D policy. Because we conclude that Mobil did not act arbitrarily in denying benefits based on its application of the term "accident," we do not reach these other grounds for the denial.

> costs of such unreasonable risk-taking on the plan would result in an unanticipated cost.

Mobil further explained that "[t]he fact that the coroner's report and the police report use the term 'accident' does not govern the proper interpretation under the plan."

Mrs. Stamp filed suit in district court, asserting claims for breach of contract and breach of fiduciary responsibility. The district court held that Mrs. Stamp's common law claims are preempted by ERISA and treated her suit as an ERISA enforcement action pursuant to 29 U.S.C. § 1132(a)(1)(B). Mrs. Stamp has not appealed that determination. On cross-motions for summary judgment, the district court reviewed Mobil's denial of benefits under an "arbitrary and capricious" standard and concluded that the "determination that Mr. Stamp's death was not accidental is reasonable and supported by substantial evidence in the record." The district court entered judgment in favor of MetLife and Mobil. Mrs. Stamp filed this timely appeal.

II.

We review the district court's grant of summary judgment de novo. Wright v. R. R. Donnelley & Sons Co. Group Benefits Plan, 402 F.3d 67, 73-74 (1st Cir. 2005). Where, as here, the ERISA plan grants the plan administrator discretionary authority to make benefit determinations, we must uphold the administrator's determination unless it was "arbitrary, capricious, or an abuse of discretion." Id. at 74 (quoting Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 183 (1st Cir. 1998)); cf. Firestone Tire & Rubber

Co. v. Bruch, 489 U.S. 101, 115 (1989). Under this standard, we will uphold the denial of benefits if the plan administrator's decision was "'reasoned and supported by substantial evidence.'" Id. (quoting Gannon v. Metro. Life Ins. Co., 360 F.3d 211, 213 (1st Cir. 2004)). "Evidence is substantial if it is reasonably sufficient to support a conclusion . . . ." Gannon, 360 F.3d at 213.

Mrs. Stamp argued before the district court that this deferential standard of review was inappropriate because Mobil's contract with MetLife is "experience-rated," linking Mobil's premium costs to the number and size of claims presented. She asserted that this link represented a "structural conflict of interest" that would mandate a less deferential standard of review. However, Mrs. Stamp has abandoned this argument on appeal. In her brief, she merely cites the legal proposition that a conflict of interest may reduce the degree of deference we owe the plan administrator; she does not argue that a conflict actually exists in this case. Thus, this argument is waived.[4] See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Consequently, we review the denial of benefits under the "arbitrary and capricious" standard.

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[4] Moreover, in MetLife v. Glenn, No. 06-923 (June 19, 2008), the Supreme Court determined that a "conflict of interest" exists when a single entity both funds the plan and evaluates the claims. Slip op. at 5, 8. Mrs. Stamp did not assert this form of conflict; here, MetLife funded the plan while Mobil made final benefit determinations.

III.

Mr. Stamp's AD&D policies stated that MetLife would pay accidental death benefits if Mr. Stamp died as a result of an "accident." The term "accident" is not defined in the plan documents. The plan administrator had the task of applying this term to the circumstances surrounding Mr. Stamp's death.

In reviewing the administrator's denial of benefits, we are guided by the principles of the federal common law of ERISA. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56-57 (1987) (concluding that Congress intended for a federal common law to develop in the ERISA context); Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1084 (1st Cir. 1990). In particular, we rely on Wickman, a case in which we added to the ERISA common law by formulating an approach for interpreting the ambiguous term "accident" in AD&D insurance policies. 908 F.2d at 1087-88.

We began with the principle that "the reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms." Id. at 1088. But we noted that this was only a starting point. The operative inquiry into the insured's "expectations" in Wickman actually concerned the insured's state of mind at the time of the incident that caused his death, not at the time the policy was purchased. See id. at 1089 ("If he actually expected the result, even if he did not specifically intend it, then his actual expectations make his death not accidental."). We see no necessary inconsistency between these two formulations of the relevant time

frame. The conclusion that the insured expected, or reasonably should have expected, that death would result from the particular conduct at issue is tantamount to the conclusion that no reasonable person, when buying an insurance policy, could expect that AD&D benefits would be paid out when his death results from that sort of conduct. In any case, aside from the reference to the expectations at the time of purchase as a "starting point," the analysis in Wickman makes no further reference to those expectations and is instead concerned solely with the insured's expectations related to the intentional conduct that caused his death. We adopt that approach as well.

The Wickman analysis thus began with an inquiry into the expectations of the insured at the time of the incident that caused his death. However, this subjective inquiry was not determinative. We held that even if "the fact-finder determines that the insured did not expect an injury similar in type or kind to that suffered, the fact-finder must then examine whether the suppositions which underlay that expectation were reasonable." Id. at 1088. We further observed that "'the subjective state of mind of the insured cannot be generally known.'" Id. at 1087-88 (quoting Hoffman v. Life Ins. Co., 669 P.2d 410, 419 (Utah 1983)). Thus, in the usual case, where the fact-finder will find "the evidence insufficient to accurately determine the insured's subjective expectation," the fact-finder "should then engage in an objective analysis of the insured's expectations." Id. at 1088. We framed this objective analysis as an inquiry into "whether a reasonable person, with background and characteristics similar to the insured, would have

viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Id. This reasonable person analysis, "when the background and characteristics of the insured are taken into account, serves as a good proxy for actual expectation." Id.

We then applied this framework to the particular facts in Wickman, where the insured died after falling from a railroad bridge, having intentionally climbed over the guardrail on the side of the bridge. Although there was some evidence that the insured intended to kill himself, we determined that his actual expectations could not be ascertained. Id. at 1088. Therefore, we applied the objective prong of the Wickman analysis and concluded that "[o]bjectively, he reasonably should have expected serious injury when he climbed over the guardrail and suspended himself high above the railroad tracks below by hanging on to the guardrail with only one hand." Id. at 1089. Consequently, we upheld the determination that his death was nonaccidental.[5]

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[5] In Wickman, we interpreted the term "accident" de novo, affording no deference to the plan administrator. Although the case was decided about a year after the Supreme Court's statement in Firestone, 489 U.S. at 115, that a deferential standard of review should be applied where the benefit plan grants the administrator discretion to make benefit determinations, Wickman contains no discussion of the applicable standard of review. We can only surmise that discussion of Firestone was unnecessary because the policy at issue in Wickman did not contain the critical discretionary language that would have altered the standard of review.

Our reasoning in Wickman has been widely accepted by our sister circuits.[6] See Eckelberry v. Reliastar Life Ins. Co., 469 F.3d 340, 343-45 (4th Cir. 2006). Applying Wickman, federal courts have, "with near universal accord," upheld plan administrators' determinations that "alcohol-related injuries and deaths are not 'accidental' under insurance contracts governed by ERISA." Id. at 344; see also Lennon v. Metro. Life Ins. Co., 504 F.3d 617, 622-23 (6th Cir. 2007); Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104, 1110 (7th Cir. 1998); Weatherall v. Reliastar Life Ins. Co., 398 F. Supp. 2d 918, 924 (W.D. Wis. 2005); Mullaney v. Aetna U.S. Healthcare, 103 F. Supp. 2d 486, 494 (D.R.I. 2000); Walker v. Metro. Life Ins. Co., 24 F. Supp. 2d 775, 782 (E.D. Mich. 1997); Schultz v. Metro. Life Ins. Co., 994 F. Supp. 1419, 1422 (M.D. Fla. 1997); Nelson v. Sun Life Assurance Co., 962 F. Supp. 1010, 1012 (W.D. Mich. 1997); Miller v. Auto-Alliance Int'l, Inc., 953 F. Supp. 172, 176-77 (E.D. Mich. 1997); Cates v. Metro. Life Ins. Co., 14 F. Supp. 2d 1024, 1027 (E.D. Tenn. 1996), aff'd, 149 F.3d 1182 (6th Cir. 1998) (unpublished). But see West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 904 (N.D. Iowa 2001). Thus, the plan administrator was correct to

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[6] Some of these courts have struggled with whether a "reasonable foreseeability" test, which arguably is a less favorable test for the insured than the "highly likely" phrase in Wickman itself, may be used by a plan administrator without running afoul of Wickman. See Lennon v. Metro. Life Ins. Co., 504 F.3d 617, 625 (6th Cir. 2007) (Boggs, C.J., concurring). Although MetLife used the phrase "reasonably foreseeable" in its initial benefit denial, Mobil did not invoke that standard. We review the decision of the plan administrator, Mobil. As such, we have no occasion to comment on the acceptability of using "reasonable foreseeability" as a shorthand for Wickman.

conclude, in denying Mrs. Stamp's benefit claims, that "the weight of authority under applicable Federal law would not compel" a finding that Mr. Stamp's collision was accidental.[7]

In applying the Wickman analysis to drunk-driving deaths, courts have stated that "'the hazards of drinking and driving are widely known and widely publicized'" and reasoned that, as a result, "the insured should have known that driving while intoxicated was highly likely to result in death or bodily harm." Eckelberry, 469 F.3d at 345 (quoting Nelson, 962 F. Supp. at 1012). As the Supreme Court recently observed, albeit in a different context, "[d]runk driving is an extremely dangerous crime."

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[7] Mrs. Stamp cites two federal cases, King v. Hartford Life & Acc. Ins. Co., 357 F.3d 840 (8th Cir. 2004), and West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001), for the proposition that drunk driving deaths must be held to be "accidental" under the Wickman analysis. However, the Eighth Circuit vacated the King opinion to which she refers. King v. Hartford Life & Acc. Ins. Co., 414 F.3d 994 (8th Cir. 2005) (en banc). Upon rehearing, the en banc court declined to reach the issue of whether the insured's claim was, as a matter of law, an accident under the Wickman test because the plan administrator had not explicitly applied Wickman in explaining its benefit denial. King, 414 F.3d at 1003-04. Instead, the court remanded the case to the plan administrator with directions to apply the Wickman test because the administrator had "abandon[ed] in litigation its original basis for denying benefits." Id. at 1005-06. The Eighth Circuit's disposition of King calls into question the continued vitality of West, which was decided by a district court in that circuit. See McElyea v. AIG Life Ins. Co., 326 F. Supp. 2d 960, 967 n.4 (E.D. Ark. 2004) (noting that the King panel had endorsed the West opinion but that the panel opinion had been vacated by the en banc court).

Begay v. United States, 128 S. Ct. 1581, 1584 (2008). It is common knowledge that the danger grows even more extreme as the driver's level of intoxication increases. Nat'l Hwy. Traffic Safety Admin., U.S. Dep't of Transp., Setting Limits, Saving Lives: The Case for .08 BAC Laws, DOT HS 809 241, revised Apr. 2001. Accordingly,

> any drunk driver who takes to the road should know he runs a risk of injuring another person [or himself]. The extent of the risk will of course vary from case to case, depending on how intoxicated the driver is, how far he drives, how fast he drives, and how many other drivers and pedestrians are sharing the road with him.

Lennon, 504 F.3d at 621 (quoting United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995)). Following this logic, courts have emphasized the decedent's level of intoxication when determining that a plan administrator's denial of benefits was reasonable. See, e.g., id. at 623 (BAC of more than three times the legal limit); Eckelberry, 469 F.3d at 345 (BAC of one and a half times the legal limit); Cozzie, 140 F.3d at 1106 (BAC of more than two times the legal limit). We endorse this approach.[8] The Wickman analysis does not require a categorical determination that all alcohol-related deaths are per

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[8] The dissent asserts that we have "[d]eferentially follow[ed] in the footsteps of other circuits that have examined this question." Dissent at 24. That is not the case. We have simply noted the trend among federal courts. However, we have, as Wright and Firestone require, deferred to the decision of the plan administrator.

se accidental or nonaccidental. Rather, it leads us to consider the circumstances of the fatal event in question.[9]

In this case, the plan administrator had substantial evidence that Mr. Stamp was severely intoxicated when he died. The toxicology report indicated that Mr. Stamp's BAC at the time of his death was in the range of .231% to .265%. MetLife's medical department had advised that this level of intoxication "would cause delirium intoxication. In a sporadic drinker it would cause lethargy, stupor, combativeness, incoherency & vomiting. In a chronic drinker, there would be [illegible] emotional changes and mood changes."[10] An internal Mobil memorandum, prepared during the review of Mrs. Stamp's claim, further elaborated:

> Various on-line sources indicate that Mr. Stamp's ability to control his vehicle would have been significantly impaired. For example, the National Highway Transportation Safety Administration states that all drivers, even experienced drivers, show impairment at a BAC of 0.08 – one-third the level reported for Mr. Stamp. The "Police Handbook" published by the

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[9] The dissent appears to suggest that we are categorically concluding that all alcohol-related deaths could be considered nonaccidental. That is not so. On the contrary, we have been careful to explain that the proper approach is fact-specific and that the decedent's degree of intoxication is particularly probative.

[10] We note that there is no evidence in the record to suggest that Mr. Stamp was anything more than a sporadic drinker.

> Oklahoma University Police has the following descriptions of the effects of various BACs:
>
> 0.20 Feeling dazed/confused or otherwise disoriented. May need help to stand/walk. Blackouts are likely.
>
> 0.25 All mental, physical and sensory functions impaired.
>
> Our own medical department has confirmed that the assessments by MetLife and these internet sources are reasonable, and that serious impairment would be expected.

In its letter denying Mrs. Stamp's claims, Mobil noted that "[t]here is no evidence to suggest that another vehicle or object, mechanical failure, or adverse weather or road collisions contributed to the collision," and concluded that "Mr. Stamp's BAC was at least a substantial contributing cause of the collision." In light of this well-developed record of the severe impairment that would be expected from Mr. Stamp's level of intoxication and the administrator's reasonable inference that his drunk-driving was a "substantial contributing cause" of the crash, we cannot say that it was arbitrary and capricious for the administrator to determine that Mr. Stamp's death was not "as a result of an accident." In Wickman terms, it is not arbitrary and capricious to conclude that a reasonable person would view death or serious injury as a highly likely outcome of driving while so drunk that one may need help to stand or walk and is likely to black out.[11]

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[11] Mobil did not invoke the particular terms of Wickman in the denial letter it sent to Mrs. Stamp. Instead, it stated more

IV.

Mrs. Stamp makes four arguments to support her claim that Wickman compels us to reach a contrary determination. First, she marshals evidence from phone calls earlier in the evening to make the case that her husband did not sound impaired, was "in good spirits," and was looking forward to a family event the next day. She concludes that this evidence indicates "clearly" that Mr. Stamp "had no subjective expectation of death or injury." We disagree. The conversations she cites shed little light on Mr. Stamp's state of mind many hours later after he had consumed more alcohol. Moreover, Mr. Stamp's actual subjective expectation that he would arrive safely at his parents' house, even if it were clearly established in the record, is not dispositive. In Wickman, we explicitly rejected the contention that "unless [the insured] actually expected to die, essentially that he specifically

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generally that "the weight of authority under applicable Federal law would not compel" a finding that Mr. Stamp's death was an accident. The benefit denial is then explained in terms of the plan administrator's interpretation of the purposes of the plan. This conclusion is not arbitrary and capricious because of its failure to recite the Wickman formula. See Cozzie, 140 F.3d at 1110 ("We cannot say . . . that [the administrator's] determination that the purposes of the plan are best served by acknowledging a qualitative difference between the ingestion of a huge quantity of alcohol and other tragedies of human life which do not involve such a significant assumption of a known risk by the insured is incompatible with the goals of the plan."). The decision reached by the plan administrator is compatible with Wickman, even if the administrator did not explain his decision in Wickman terms. Moreover, Mrs. Stamp has not asserted that the plan administrator made a legal error by failing to recite the Wickman formula in its denial letter.

intended to commit suicide, his death must be considered an accident."[12] 908 F.2d at 1087. Instead, the critical determination under Wickman lies in an objective analysis of what the insured reasonably should have expected when he decided to drive while highly intoxicated.

Second, Mrs. Stamp contends that the statistical evidence she presented to the district court "establishes that it cannot be reasonably concluded by either common sense or legal analysis that death resulting from driving under the influence of alcohol is . . . 'highly likely.'" Her statistics, gleaned from a comparison of the number of drunk driving arrests and the number of alcohol related driving fatalities, show that "the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%." However, as the district court properly noted, such statistics are "meaningless in this context." They simply do not take into account the degree of intoxication of the driver in question. As we noted earlier, the risk of being involved in a fatal crash rises as blood alcohol levels rise. Accordingly, statistics that do not differentiate between various levels of intoxication are inapposite. See Lennon, 504 F.3d at 623 ("[D]rivers with blood-alcohol levels above the

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[12] The dissent frames the issue as "whether [Mr. Stamp] intended to kill himself by becoming intoxicated and driving while in this condition." Dissent at 26. While this is the appropriate inquiry under the policy exclusion for intentional self-inflicted injury, it is not the appropriate inquiry when considering the term "accident." Indeed, the theory that all deaths are accidental unless the decedent subjectively intended to die was explicitly rejected in Wickman. 908 F.2d at 1087.

legal limit as a group are far more likely to arrive home safely than drivers who are extremely drunk.").

Moreover, the focus of our objective analysis in Wickman was not on the statistical probability that death would occur from the decedent's actions. Instead, we were concerned chiefly with what a reasonable person would perceive to be the likely outcome of the intentional conduct. Wickman, 908 F.2d at 1089. Russian roulette provides an archetypal example of this critical distinction. From a statistical standpoint, the likelihood of dying from a single round of Russian roulette is 16% – one in six. Such a death is not "highly likely" if that phrase is taken to mean "more likely than not" or "substantially certain." In fact, those who play Russian roulette have a decent chance, statistically speaking, of not being injured. Lennon, 504 F.3d at 623. Nonetheless, such a death "would not be publicly regarded as an accident" because the mortal risk associated with playing Russian roulette is patently obvious to any reasonable person. Wickman, 908 F.2d at 1087. Similarly, even if Mrs. Stamp had adduced evidence that those who drive while extremely drunk have a better than even chance of arriving home safely, that evidence would not have been dispositive. Statistical analysis is simply not at the core of the Wickman analysis.[13]

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[13] In its discussion of the relevance of statistics, the dissent analogizes to the high rate of lung cancer arising from smoking and states that "it would be highly unusual . . . to conclude that anyone who smokes is engaging in a suicidal act and is thus excludable from coverage under the policy." Dissent at 29. We agree that smoking is probably not a "suicidal act," but it is equally true that a smoker's death from lung cancer is not

Instead, as the Sixth Circuit has explained, Wickman's framework reflects that "at some point the high likelihood of risk and the extensive degree of harm risked, weighed against the lack of social utility of the activity, become not marginally but so overwhelmingly disproportionate that the resultant injury may be outside a definition of 'accidental' that is not unreasonably narrow." Lennon, 504 F.3d at 623. It was not arbitrary for the plan administrator here to conclude that Mr. Stamp's decision to drive while grossly intoxicated qualifies as overwhelmingly and disproportionately risky conduct.

Third, Mrs. Stamp challenges the conclusion that her husband's death was causally related to his intoxication. She speculates that the accident could have been caused by an attempt to avoid a collision with another vehicle or with an animal. Because we are concerned with the definition of "accident" as a threshold of eligibility for benefits, the burden of proof is on Mrs. Stamp to show the existence of coverage. See 17A Lee Russ & Thomas F. Segalla, Couch on Insurance § 254:16 (3d ed. 2007); see also Mario v. P&C Food Markets, Inc., 313 F.3d 758,765 (2d Cir. 2002) (asserting, in an ERISA case, that "the insured has the burden of proving that a benefit is covered, while the insurer has the burden of proving that an exclusion applies"); Jenkins v. Montgomery Indus., Inc., 77 F.3d 740, 743 (4th Cir. 1996) (same); Blair v. Metropolitan Life Ins. Co., 974 F.2d 1219, 1221 (10th

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"accidental" within the meaning of an AD&D policy. As we are concerned here with the definition of "accident" and not the definition of "suicide," the dissent's analogy is inapt.

Cir. 1992) (same). Mrs. Stamp's speculation regarding alternative causes for the collision falls far short of the evidence needed to carry her burden. As a result, the plan administrator's finding of fact as to causation is not "arbitrary and capricious."

Fourth, Mrs. Stamp invokes the contra proferentem doctrine, which holds that the policy terms must be strictly construed against the insurer and in favor of the insured. However, this doctrine is only applied when courts undertake de novo review of plan interpretations:

> When the administrators of a plan have discretionary authority to construe the plan, they have the discretion to determine the intended meaning of the plan's terms. In making a deferential review of such determinations, courts have no occasion to employ the rule of contra proferentem. Deferential review does not involve a construction of the terms of the plan; it involves a more abstract inquiry – the construction of someone else's construction.

Morton v. Smith, 91 F.3d 867, 871 n.1 (7th Cir. 1996); see also Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir. 1995). We are engaged in that "more abstract inquiry" here, and thus the doctrine is inapplicable to our review.

V.

Under the "arbitrary and capricious" standard, "we need not decide what is the best reading of the words

in the insurance policy," Lennon, 504 F.3d at 624, nor how we would have applied those words de novo. Instead, we are called upon only to decide whether the plan administrator's denial of benefits was "'reasoned and supported by substantial evidence.'" Wright, 402 F.3d at 74 (quoting Gannon v. Metro. Life Ins. Co., 360 F.3d 211, 213 (1st Cir. 2004)). As we have set forth above, the administrator's determination that Mr. Stamp's death was nonaccidental is compatible with Wickman. Objectively, he reasonably should have expected death or serious injury when he drove with a BAC of more than three times the legal limit. That conclusion does not lessen the tragedy of Mr. Stamp's death. It simply means that the plan administrator's denial of benefits was not arbitrary and capricious, and the judgment below is affirmed.

So ordered.

– Dissenting Opinion Follows –

TORRUELLA, Circuit Judge (Dissenting). Mrs. Stamp's ability to recover most of the insurance benefits at issue hinges on whether her husband's death was an accident within the meaning of the MetLife policies. It is clear to me that Mr. Stamp's death while driving under the influence of alcohol was the result of an accident. As the Supreme Court recently noted, "DUI . . . involves 'accidental or negligent conduct.'" Begay v. United States, 128 S. Ct. 1581, 1587 (2008) (quoting Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)) (emphasis added). In Wickman v. Northwestern Nat'l Ins., 908 F.3d 1077, 1084 (1st Cir. 1990), we announced a standard for determining whether a death was "accidental" within the meaning

of an ERISA-qualified policy. Noting that terms like "accident" "should be judged from the viewpoint of the insured," we promulgated a three-prong test because "actual expectation is often difficult, if not impossible to determine." Id. (1) "[The] reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms." Id. at 1088. (1) "If the fact-finder determines that the insured did not expect an injury similar in type or kind to that suffered, the fact-finder must then examine whether the suppositions which underlay that expectation were reasonable." Id. (3) "Finally, if the fact-finder, in attempting to ascertain the insured's actual expectation, finds the evidence insufficient to accurately determine the insured's subjective expectation, the fact-finder should then engage in an objective analysis of the insured's expectations." Id.

The present case marks our first opportunity to apply the Wickman analysis to a factual scenario that involves a policyholder who died with a heightened Blood Alcohol Content ("BAC") level in a one-car collision. Deferentially following the footsteps of other circuits that have examined this question,[14] the majority concludes that Mr. Stamp's death was not accidental. I cannot disagree more vehemently with that outcome.

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[14] See Lennon v. Metro. Life Ins. Co., 504 F.3d 617 (6th Cir. 2007); Eckelberry v. Reliaster Life Ins. Co., 469 F.3d 340 (4th Cir. 2006); King v. Hartford Life & Accident Ins. Co., 414 F.3d 994 (8th Cir. 2005) (en banc); Buce v. Allianz Life Ins. Co., 247 F.3d 1133 (11th Cir. 2001); Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104 (7th Cir. 1998).

I do not feel compelled to follow these prior opinions because I believe that in reaching this outcome, those cases misapplied the third prong of Wickman, an error duplicated by the majority, which also focuses too heavily on a "reasonably foreseeable" analysis. See slip op. at 10. In Wickman, we said that "[i]n [our] analysis, [we are required to] ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." 908 F.3d at 1088 (emphasis added).

I believe that those circuits that have examined insurance policy exclusions similar to the ones at issue here, using a "highly likely" or "substantially certain" standard, are the ones that have reached the correct answer to the question. See Padfield v. AIG Life Ins. Co. of Am., 290 F.3d 1121 (9th Cir. 2002); Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997) Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995). Those circuits applied Wickman in a proper fashion by engaging in the following analysis:

> [F]or death under an accidental death policy to be deemed an accident, it must be determined (1) that the deceased had a subjective expectation of survival, and (2) that such expectation was objectively reasonable, which it is if death is not substantially certain to result from the insured's conduct.

Santaella, 1243 F.3d at 463 (quoting Todd, 47 F.3d at 1456) (emphasis added).

The administrator, which was affirmed by the majority, created out of whole cloth an exclusion ex post facto denying coverage where the decedent's BAC is above legal limits when death occurs. Rather than attempting to insert an exclusion by inference, what should be done in those cases in which the parties have not agreed to such a provision beforehand, is to have a clause specifically establishing such an exclusion. See Marcus Wilbers, Note, Alcohol-Related Car 'Accidents'? The Eighth Circuit Moves Toward Policy Change in ERISA Litigation, 71 Mo. L. Rev. 471, 491 (2006) ("To eliminate any uncertainty, plan administrators should include an alcohol-related exclusion in all accidental death insurance plans.").

The policies at issue here do not include a definition for "accident." In Wickman, we said that "[c]ase law is fairly consistent in defining an accident, using equally ambiguous terms such as undesigned, unintentional, and unexpected." Wickman, 908 F.2d at 1087; Santaella, 123 F.3d at 464 ("Interpreting the policy terms in an ordinary and popular sense, in the way that a person of average intelligence and experience would, we treat the term 'accidental' as it is commonly defined, as 'unexpected or unintentional.'" (footnote and citations omitted)).[15] Applying Wickman, Mr. Stamp's death can be termed nothing other than an unfortunate accident. The question is not, as the majority frames it, whether Mr. Stamp was severely intoxicated. See slip op. at 14. The question is whether he intended to kill himself by becoming

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[15] Both the police and the autopsy reports indicated that the manner of death was "accidental." This is not a mere coincidence.

intoxicated and driving while in this condition. There is absolutely no evidence that Mr. Stamp had any such intention.

I. Wickman Analysis

The first prong of the Wickman analysis requires us to look at the reasonable expectation of the insured when the policy was purchased. Wickman, 908 F.2d at 1088. As we said in Wickman, "[g]enerally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments." Id. Accepting that Mr. Stamp had a BAC above the legal limit and that he was in a one-car collision with no other evidence of why he veered off the road and hit a tree, it is fair to say that, at most, Mr. Stamp miscalculated and misjudged his ability to drive that fateful evening. He purchased insurance in order to protect himself and his family against such unforeseen accidents.

There is no evidence that Mr. Stamp's actions were the result of anything but misjudgments, not intentional actions. According to Joe Kingsley, he and Mr. Stamp discussed life insurance at some point prior to August 2. Mr. Stamp told Kingsley that he wanted to make sure that his wife and daughter would be "taken care of if anything happened" to him, adding that he had taken out significant life insurance for their benefit. On the night of his death, all evidence indicates that if Mr. Stamp would have continued along the route to his parents' house, he would have reached his destination. There is no indication that he attempted or intended to kill himself. There is no evidence that Mr. Stamp was distraught or that he

was experiencing any personal problems. A few hours before the accident, he had positive, upbeat conversations with his wife, co-workers, and friend. His decision to drive was unlike the game of Russian roulette the majority discusses because the point of that game is to see if you are lucky enough to live, see slip op. at 18, or that as in Wickman, he was doing something which objectively looked like suicide.

The second prong of the Wickman analysis instructs us to examine the reasonableness of the insured's expectations. See id. "The determination of what suppositions are unreasonable should be made from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and experiences." Id. (internal citations omitted). Much more often than not, driving while under the influence has a non-fatal outcome. Cf. Todd, 47 F.3d at 1457 ("the risk of death from autoerotic practice is 'not of such a nature that [the decedent] knew or should have known that it probably would result in death. Death was not a normal expected result of the behavior.'" (citation omitted)(emphasis added)). In 2002, the year Mr. Stamp died, only forty-one percent of people who died in automobile-related collisions did so in collisions that involved a driver with a BAC above the legal limit. See U.S. Dep't of Transp., Traffic Safety Facts 2004 32 (2004). Almost sixty percent of the people who died that year did so from car accidents involving a driver with a BAC of zero. See id. Given this, it can be said that "a reasonable person would not view death as 'highly likely' to result from driving drunk.'" Michael E. Gardner, Note, Accidental Death Insurance Coverage of Drunk Drivers, 69 Mo. L. Rev. 235, 246

(2004). Instead, "[i]t is not highly likely for an impaired driver to die in an alcohol-related wreck, and those deaths are therefore accidents." Id. at 472. Smoking cigarettes is responsible for eighty-seven percent of lung cancer deaths, see Am. Cancer Soc'y, Cancer Facts & Figures 2008 48 (2008), and nearly twenty percent of smokers die from heart disease, see Am. Heart Ass'n, Cigarette Smoking and Cardiovascular Diseases, (June 16, 2008). Yet it would be highly unusual where the administrator, or this Court, to conclude that anyone who smokes is engaging in a suicidal act and is thus excludable from coverage under this policy.

In any objective analysis, we must "ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Wickman, 908 F.2d at 1088 (internal citations omitted). In 2005, nearly 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics. See United States Dep't of Justice, Crime Prevention in the United States 2005, Table 29. This number is much higher, both empirically and as a percentage, than the number of people who died as a result of driving under the influence. Thus, "[w]hat common knowledge . . . actually tell[s] a person driving while intoxicated is that he or she is far more likely to be arrested for driving while intoxicated than to die or be injured in an alcohol-related automobile crash, and far more likely to arrive home than to be either arrested, injured, or killed." West v. Aetna Life Ins. Co., 171 F. Supp. 2d. 856, 904 (N.D. Iowa 2001).

The likelihood of death is even less probable when we take into account that the number of people arrested for drunk driving is lower than one percent of the 159 million self-reported cases of alcohol–impaired driving among adults in the United States each year. See Kyran P. Quinlan et al., "Alcohol-Impaired Driving Among U.S. Adults, 1993-2002," 28 Am. J. of Preventive Med., 346, 348-49 (2005). These statistics do not demonstrate that it is highly likely that someone who is driving under the influence will die.

Thus, Mr. Stamp "had a subjective expectation of survival and . . . such an expectation was objectively reasonable because death was not certain or even highly likely to result from [his] conduct." Santaella, 123 F.3d at 464 (citing Todd, 47 F.3d at 1456). "Drunk driving is, to be sure, a foolish and reckless act. However, when an insured dies as a consequence of his driving while intoxicated, his death should still be considered accidental because a reasonable person would not view death as a natural and probable consequence of drunk driving." Gardner, supra at 253. It cannot be said that Mr. Stamp expected or intended to kill himself. See Santaella, 123 F.3d at 463 ("[T]he record simply would not support a jury determination that a reasonable person in [the decedent's] situation would have considered death either 'highly likely to occur' . . . or 'substantially certain to result from the insured's conduct.'" (citations omitted)). I believe that appellees abused their discretion when they denied Mrs. Stamp's claims because of a determination that Mr. Stamp's death was not an accident. Mrs. Stamp's

claims, however, were denied on other grounds as well. We examine those grounds below.[16]

II. Intentionally Self-Inflicted Injury Exclusion

The inquiry for examining policy exclusions for intentional self-destruction and intentionally self-inflicted injury mirrors the analysis above. Given the facts, and knowing that Mr. Stamp was on his way to his parents' house to meet his family, it cannot be said that his death was the result of a self-inflicted injury. In Wickman, the decedent drove onto a bridge, got out of his car, and went to a part of the bridge that he only would have gone to if he intended to kill himself. See Wickman, 908 F.2d at 1079-80. We found that his death was not the result of an accident. See id. at 1089. "[A] reasonable person in Wickman's shoes would have expected to die or be seriously injured as result of [his actions]." Id. at 1088. That cannot be said here. There is no evidence that he intentionally struck the tree which caused his death. "[T]he record [does] not support a determination that the insured 'did anything other than make a fatal mistake.'" Padfield, 290 F.3d at 1121 (quoting Santaella, 123 F.3d at 465).

As with the term "accident," there is no definition in the policy of "intentionally self-inflicted injury." In ERISA cases, we use federal common law rules to

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[16] The majority did not examine the other policies because they also require the death to be a result of an accident. See slip op. at 5 n.3.

"'interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience,' and 'construe all plan ambiguities in favor of the insured.' Plan language may only be deemed ambiguous where 'it is subject to more than one reasonable interpretation.'" Santaella, 123 F.3d at 461 (quoting Life Ins. Co. of N. Am. v. Von Valtier, 116 F.3d 279, 283 (7th Cir. 1997)). A person of average intelligence and experience would not think that someone who dies in a one-car collision, even with a BAC above the legal limit, intentionally caused his own death.[17] No doubt, Mr. Stamp's decision to drive while intoxicated was risky, "but voluntary risky acts resulting in injury are not necessarily acts that result in 'intentionally self-inflicted injury.'" Padfield, 290 F.3d at 1129. Accordingly, I believe that Mrs. Stamp's claim for Basic AD&D insurance benefits should not have been denied by Appellees.

III. Crime Exclusion

Both the Voluntary and Occupational AD&D policies have exclusions for decedents who die while "committing or attempting to commit a felony or other serious crime." Appellees denied Mrs. Stamp's claim because Mr. Stamp had a BAC level above the legal limit while he was operating his vehicle.

I believe that the exclusion is inapplicable and find that the Appellees abused their discretion when they found that Mr. Stamp committed a serious crime. Mr.

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[17] As previously noted, both the police and the autopsy reports classified the manner of death as "accidental."

Stamp was operating his vehicle in Rhode Island when he died, and under Rhode Island law it is not a felony to operate a vehicle while under the influence of alcohol; it is a misdemeanor. See Rhode Island Motor Vehicle Offenses, § 31-27-2(a).[18] By definition, a misdemeanor is not a serious crime. See United Union of Roofers, Waterproofers, & Allied Workers, Union No. 33 v. Meese, 823 F.2d 652, 656 (1st Cir. 1987) ("the 'misdemeanor' label typically applies to crimes that are not very serious") (citation omitted). Accordingly, I would find that the crime exclusion does not apply, and that Mrs. Stamp is entitled to Voluntary AD&D benefits. This does not answer whether Mrs. Stamp is entitled to Occupational AD&D because that policy requires death to occur "while at work."

IV. "While at Work" Exclusion

In order for Mrs. Stamp to qualify for Occupational AD&D benefits she had to demonstrate that Mr. Stamp was "at work" when he died. The policy clearly states that "while at work" "does not include any personal time taken before, during or following a Mobil-approved business trip." Mrs. Stamp argues

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[18] The Rhode Island statute reads in relevant part:

> (a) Whoever drives or otherwise operates any vehicle in the state while under the influence of any intoxicating liquor, drugs, toluene, or any controlled substance as defined in chapter 28 of title 21, or any combination of these, shall be guilty of a misdemeanor except as provided in subdivision (d)(3) and shall be punished as provided in subsection (d) of this section.

that Mr. Stamp was "at work" because the meeting he attended was mandatory and he died on his way back from the meeting. ExxonMobil noted that Mr. Stamp was no longer "traveling from" the work-related business meeting when he died. ExxonMobil also noted Mr. Stamp stopped "for several hours for a separate, purely personal purpose."

According to Mrs. Stamp, Mr. Stamp's co-workers, and Kingsley, Mr. Stamp was not inebriated when he left his work function. Mr. Stamp was legally inebriated when he died; his BAC level was three-times the legal limit. Given the road conditions, the weather, and Mr. Stamp's conversation with Kingsley at about 9:30 p.m., Mr. Stamp should have reached his parents' house by 10:30 p.m. Yet, by midnight, he still had not reached his destination. The conclusion that Mr. Stamp became inebriated by reason of some non-work related activity after he left the work function is supported by circumstantial evidence. Thus, I would find that ExxonMobil did not abuse its discretion when it determined that Mr. Stamp's collision occurred during "personal time taken . . . following" his trip and that Mrs. Stamp is not entitled to recover under the Occupational AD&D policy.

V. Conclusion

For the reasons explained above, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1061

[Filed June 30, 2008]

KAREN STAMP,	)
	)
Plaintiff, Appellant,	)
	)
v.	)
	)
METROPOLITAN LIFE INSURANCE COMPANY; ADMINISTRATOR-BENEFITS, EXXONMOBIL BENEFIT PLAN; EXXONMOBIL CORPORATION; EXXONMOBIL BENEFIT PLAN; LIFE INSURANCE PROTECTION PLAN OF MOBIL OIL CORPORATION; and LIFE INSURANCE PLAN OF MOBIL OIL CORPORATION,	)
	)
Defendants, Appellees.	)
	)

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
/s/ Richard Cushing Donovan, Clerk

cc: Mr. Mason, Ms. Shaghalian, Mr. Linker, Ms. Magratten, & Mr. McNamara.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 04-488L

[Filed December 13, 2006]

KAREN STAMP,
Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY; ADMINISTRATOR-BENEFITS, EXXON MOBIL BENEFIT PLAN; EXXON MOBIL BENEFIT PLAN; EXXON MOBIL CORPORATION; LIFE INSURANCE PROTECTION PLAN of MOBIL OIL CORPORATION; and LIFE INSURANCE PLAN of MOBIL OIL,
Defendants.

MEMORANDUM AND ORDER

Ronald R. Lagueux, Senior United States District Judge.

This matter is before the Court on cross-motions for summary judgment made pursuant to Federal Rule of Civil Procedure 56(b). On one side, Defendants Metropolitan Life Insurance Company ("MetLife"), Administrator-Benefits, Exxon Mobil Benefit Plan, Exxon Mobil Benefit Plan, Exxon Mobil Corporation, Life Insurance Protection Plan of Mobil Oil Corporation, Life Insurance Plan of Mobil Oil[1] (collectively, "Mobil") jointly move for summary judgment. On the other side, Plaintiff Karen Stamp simultaneously objects to Defendants' Motion and moves for summary judgment. While Mobil and MetLife moved jointly for summary judgment, the two groups of Defendants submitted separate exhibits to support their Motion, each consisting of their respective claim files and the affidavit of the administrator of the claim.[2] The Court heard oral arguments on May 9, 2006, and took the matter under advisement. This case is now in order for decision. For the reasons that follow, the Court grants

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[1] There was some confusion regarding the proper names of the Defendant corporate entities in the parties' papers. The Court will use the names and spelling offered by Defendants in their Memorandum in Support of Defendants' Joint Motion for Summary Judgment.

[2] Mobil's exhibits are headed by the affidavit of Douglas F. Garrison, the Plan Administrator. MetLife's exhibits are headed by the affidavit of Thomas F. Presite, the Claim Examiner for MetLife. When citing to the different claim files, the Court will refer to the two sets of exhibits by the party offering them. Since MetLife's exhibits have a pagination system and those of Mobil do not, the Court will refer to the documents in MetLife's exhibits by page number and to those in Mobil's exhibits by broader description.

Defendants' Motion for Summary Judgment and denies Plaintiff's Cross-Motion for Summary Judgment.

I. Facts

The following facts are undisputed by the parties. On August 2, 2002, the late Stephen Stamp, husband to Plaintiff Karen Stamp, attended an employee meeting at a resort in Westbrook, Connecticut. Mr. Stamp was then employed by Exxon Mobil Chemical Company, a division of Exxon Mobil Corporation, as a maintenance manager in Connecticut where he lived. The meeting consisted of presentations in the morning and a boat cruise in the afternoon, followed by dinner that evening. By all accounts, Mr. Stamp attended every part of the company meeting and consumed several alcoholic beverages during the boat cruise and dinner. Mr. Stamp spoke with his wife at 5:20 p.m. that evening, before the dinner, and she attests that he did not sound impaired to her, that he "sounded in good spirits," and that he had enjoyed the meeting and cruise. (Mobil Ex. E, Karen Stamp Aff. ¶ 21.) During their conversation, the Stamps also confirmed their earlier-made plans for Mr. Stamp to drive to Johnston, Rhode Island from the meeting in Connecticut and stay at his parents' home, where his wife and young daughter would join him to celebrate his brother's 40th birthday party the next day.

After speaking with his wife, Mr. Stamp attended the company dinner and then joined a few co-workers at the hotel bar. Those co-workers reported that Mr. Stamp left the hotel between 8:30 and 9:00 p.m., that he did not seem impaired or unsteady, and that his

speech and thoughts seemed coherent when he got in his car to drive to Rhode Island. Mr. Stamp's cell phone records reveal that he made several phone calls after having left the hotel. At 9:20, Mr. Stamp phoned a friend who lived in Rhode Island, Joe Kingsley, and spoke with him for about 9 minutes. Mr. Kingsley recounts that the two spoke about possibly meeting, but Mr. Kingsley demurred on account of an early work start the next morning. Mr. Kingsley also describes Mr. Stamp's mood as positive and upbeat and attests that he did not seem intoxicated.

According to the police report, Mr. Stamp was in a one-car collision at approximately midnight when his car went off the road in Johnston, Rhode Island. The police report describes the incident as occurring when Mr. Stamp, while traveling north on Route 295, "lost control" and "exited the left side of the roadway briefly causing [his vehicle] to skid across the second and first lanes of travel." (MetLife Ex. D at 146.) The car then exited the right side of the roadway, rotated 180 degrees, and struck a tree. Mr. Stamp was pronounced dead on the scene at 12:07 a.m. The police report describes the road condition at the time of the collision as dry, the traffic condition as light and there were no adverse weather conditions.

The autopsy report prepared by the Rhode Island Office of Medical Examiners concluded that the cause of death was "[m]ultiple injuries due to blunt force trauma." (MetLife Ex. D at 138.) The report also noted "acute ethanol intoxication" as another significant finding. (Id.) The toxicology report prepared by the same office found Mr. Stamp's postmortem heart blood

ethanol level was 265 mg/dl, which can also be expressed as a 0.265% blood alcohol level.

In a communication to MetLife's Group Claims Division dated January 9, 2003, MetLife's Medical Department opined that Mr. Stamp's level of intoxication "would cause delirium intoxication. In a sporadic drinker it would cause lethargy, stupor, combativeness, incoherency and vomiting. In a chronic drinker there would be mild emotional changes and motor changes." (MetLife Ex. D at 119.)

Defendants posit that Mr. Stamp must have stopped somewhere on the way to his parents' house that night and consumed more alcohol, given the reports of his unimpaired motor and verbal skills when he left the hotel bar and the ultimate finding of blood alcohol level in the toxicology report. Defendants also point to the fact that the Medical Examiner noted a stamp on the back of Mr. Stamp's hand that said "copy," (MetLife Ex. D at 134) as well as to the lapse of time between his departure from the hotel and the tragic event in Johnston. Because the blood alcohol level found by the Medical Examiner is unequivocal evidence of Mr. Stamp's intoxication at the time of death, the question of whether he stopped at a bar is not a material factual dispute, and the Court need not speculate as to its truth.

Mr. Stamp, as an employee of Exxon Mobil Chemical Company, was at all relevant times a participant in Mobil's employee welfare benefit plan ("the Plan"), which provided various accidental death and dismemberment ("AD&D") benefits. Mr. Stamp designated Karen Stamp as his primary beneficiary.

The focus of this litigation is the AD&D group policies issued to Mr. Stamp by Mobil, namely, Basic AD&D, Voluntary AD&D, and Occupational AD&D, the relevant terms of which follow.

1. Basic AD&D

Basic AD&D coverage was part of a package that included Basic Life Insurance. The life insurance benefits were paid to Mrs. Stamp in September 2002. The package was optional, and the participant was to pay $0.15 per month per $1,000 of coverage over $50,000, while Mobil paid the balance of the premium. Benefits were funded by MetLife group policy 23200-G. The amount that would have been payable to Mrs. Stamp for the AD&D portion of this policy is $188,000.

The operative Summary Plan Description ("SPD") states that "[i]f you are physically injured as a result of an accident and die within 90 days as a result of that injury or accident, your designated beneficiary will receive the full amount of your accidental death and dismemberment benefit as well as your normal benefit under Basic Life Insurance . . ." (Mobil Ex. A, Mobil Chemical Films Division April 1997 SPD ("1997 SPD") at 81.) The policy lists under the heading "Exceptions," "death or loss caused by . . . intentional self-destruction or intentionally self-inflicted injury." (Id.)

2. Voluntary AD&D

Voluntary AD&D, as its name suggests, must be elected by the participating employee, and the employee pays the entire cost of the coverage. The cost

to the participating employee is $0.03 for each $1,000 of coverage per month. Benefits are funded by MetLife group policy no. 27960-G.

The terms of the Voluntary AD&D coverage, as expressed in the Summary Plan Description, incorporate the conditions for payment in the Basic AD&D policy, and thereby require an "accidental death." (MetLife Ex. D at 165.) This policy also excepts payment in cases of "intentionally self-inflicted injury" or "committing or attempting to commit a felony or other serious crime or an assault." (Id.) The amount that would have been payable to Mrs. Stamp from this policy is $426,000.

3. Occupational AD&D

Occupational AD&D coverage is automatic upon employment, and is at no cost to the employee. Benefits are funded by MetLife group policy no. 33313-G. The terms of the policy state that benefits will be paid if "you are injured in an Occupational Accident . . . and if, (a) that Occupational Accident is the sole cause of the injury; and (b) that injury is the sole cause of that death; and (c) that death occurs not more than one year after the date of that Occupational Accident." (MetLife Ex. C at 109.) The plan then defines "Occupational Accident" as one which "happens in the course of any work performed 'while at work' for the Employer . . ." (Id. at 103-04.)

The plan will not pay death benefits if the death "in any way results from, or is caused or contributed by: . . . injuring oneself on purpose; or . . . committing or trying to commit a felony or other serious crime or an

assault . . . ." (Id. at 109-10.) The amount that would have been payable to Mrs. Stamp from this policy is $171,000.

At all relevant times, Mobil administered claims submitted under the Plan and acted as a fiduciary of the Plan. MetLife was also a claims fiduciary of the Plan and administered certain claims under the Plan. Mobil was the Plan Administrator at all relevant times, and as such, had "full and exclusive authority to make final determinations as to *all* issues concerning plan administration . . . ." (Mobil Ex. B, 1997 SPD at 74.)

On August 20, 2002, Mrs. Stamp submitted to MetLife a claim for Basic, Voluntary, and Occupational AD&D benefits under the Plan. MetLife paid the claim for Basic Life Insurance benefits in September 2002. MetLife denied the claims for Basic and Voluntary AD&D benefits on March 26, 2003, but left undetermined Mrs. Stamp's claim for Occupational AD&D benefits. Mrs. Stamp submitted a timely appeal of MetLife's denial to Mobil on July 20, 2004. On October 15, 2004, Mobil denied the appeal of MetLife's Basic and Voluntary AD&D denials, and rejected the claim for Occupational AD&D benefits. Mobil concluded that Mr. Stamp's death was not an "accident" for purposes of the Basic, Voluntary and Occupational AD&D policies, that his death was excluded from coverage by the Basic and Voluntary plans because it was caused by "intentionally self-inflicted injury," and that it did not occur "while at work" for purposes of the Occupational AD&D policy. Moreover, Mobil asserted that Mr. Stamp was committing a serious crime within the meaning of the

Voluntary and Occupational AD&D plans, and was thereby excluded from payment of benefits.

Plaintiff initially filed her Complaint in this Court on November 18, 2004. In the First Amended Complaint, Plaintiff asserted claims of (I) breach of contract, alleging Metlife and Mobil unreasonably denied her claim; and (II) "breach of fiduciary responsibility," alleging MetLife and Mobil owed Karen Stamp, as the intended beneficiary of the insurance policies at issue here, a fiduciary duty, which they breached.

II. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Cross-motions for summary judgment on undisputed facts require a court to determine whether either of the parties deserves judgment as a matter of law. Littlefield v. Acadia Ins. Co., 392 F.3d 1, 6 (1st Cir. 2004)(citing Barnes v. Fleet Nat'l Bank, N.A., 370 F.3d 164, 170 (1st Cir. 2004)). Similarly, in the context of a suit arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (2006), the traditional summary judgment practice of drawing inferences in favor of the nonmoving party is suspended where certain criteria are met, such as where review is based only on an agreed-upon administrative record, review is an ultimate conclusion as to disability, and there is no dispute over plan

interpretation. Orndorf v. Paul Revere Life Ins. Co., 404 F.3d 510, 517 (1st Cir. 2005). Because there is indeed a dispute over plan interpretation in this case, the Court will not suspend summary judgment procedure as in Orndorf, but will treat the cross-motions for summary judgment on undisputed facts as a "case stated" according to Littlefield.

As discussed more fully below, this is an ERISA enforcement action pursuant to 29 U.S.C. § 1132(a)(1)(B). A plan administrator's denial of benefits in the ERISA context is reviewed for abuse of discretion where the plan administrator has been expressly granted discretionary authority to determine benefit eligibility or to construe the terms of the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989). In the ERISA context, in the First Circuit, the "abuse of discretion" standard functions as the equivalent of the "arbitrary and capricious" standard. Wright v. R. R. Donnelley & Sons Co. Group Benefits Plan, 402 F.3d 67, 74 n.3 (1st Cir. 2005). Here, there is no dispute that Mobil was expressly granted this discretionary authority by the terms of the Plan, and therefore, the Court reviews Defendants' denial of benefits under the "arbitrary and capricious" standard.

Plaintiff nonetheless urges the Court to adopt a *de novo* standard of review because Mobil's contract with MetLife is "experience-rated," meaning that Mobil's premium costs are affected by the number and size of claims presented, and that because of this, Mobil was biased in its determination of Mrs. Stamp's claim by its interest in keeping its premiums low. The First Circuit has repeatedly rejected a stronger version of

this "structural conflict of interest" argument, insisting that even where the insurer is the decisionmaker on a benefits claim, its self-interest does not mandate a less deferential standard. See, e.g., Wright, 402 F.3d at 75 (listing cases). Because the self-interest created by an "experience-rated" contract does not rise to the level of conflict of interest, the "arbitrary and capricious" standard of review is appropriate for the Court to utilize when reviewing the plan administrator's decision in this case.

The "arbitrary and capricious" standard in ERISA review cases means that a plan administrator's decision will be upheld if it was within the administrator's authority, reasoned, and supported by substantial evidence in the record. Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998). Substantial evidence is "evidence reasonably sufficient to support a conclusion." Id.

III. Discussion

Neither side disputes that the plans at issue qualify as "employee welfare benefit plans" under 29 U.S.C. § 1002(1) and that, therefore, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (2006) applies to this case. While Plaintiff appears to assert state law breach of contract and breach of fiduciary duty claims in her Complaint, she nonetheless obviously brings the action under ERISA and seeks the recovery of benefits under the plans issued to her late husband.

The civil enforcement provisions of ERISA allow a plan participant or beneficiary to bring an action "to

recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ." 29 U.S.C. § 1132(a)(1)(B). These provisions were meant to preempt state laws that "relate to" an ERISA plan, 29 U.S.C. § 1144(a), and any alternative enforcement mechanism that purports to remedy the violation of a right guaranteed by ERISA, Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co., 215 F.3d 136, 141 (1st Cir. 2000). This Court has previously concluded that, under the "powerful preemptive sweep" that Congress intended ERISA to effect, Morris v. Highmark Life Ins. Co., 255 F. Supp. 2d 16, 20 (D.R.I. 2003)(quoting Danca v. Private Health Care Systems, Inc., 185 F.3d 1, 4 (1st Cir. 1999)), state law suits alleging breach of contract are preempted by the enforcement actions articulated in ERISA, 255 F. Supp. 2d at 27. In this case, Plaintiff has offered nothing to differentiate her contract claim from an ordinary request for benefits under the Mobil Plan, and her state contract claim is therefore preempted under ERISA.

ERISA does allow beneficiaries to sue a plan for breach of fiduciary duty causing individual harm. Varity Corp. v. Howe, 516 U.S. 489, 515 (1996). However, the Court in Varity specified that such suits were only appropriate for equitable relief, and then only where Congress has failed to provide adequate, more specific relief. Id. In this case, the adequate, more specific relief is payment of benefits, which bars a further remedy under the "catch-all" provision of 29 U.S.C. § 1132(a)(3), where fiduciary duty claims find their authority. Massey v. StanleyBostitch, Inc., 255 F. Supp. 2d 7, 14 (D.R.I. 2003); King v. UNUM Life

Ins. Co. of Am., 221 F. Supp. 2d 1, 4 (D. Me. 2002). Furthermore, to the extent Plaintiff asserts a common law breach of fiduciary duty claim, that claim is preempted by ERISA. See Nash v. Trustees of Boston Univ., 946 F.2d 960, 964 n.8 (1st Cir. 1991)(citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

Therefore, because Plaintiff seeks the payment of plan benefits, the Court opines that the only appropriate cause of action in this case is a claim for enforcement of the ERISA plan pursuant to 29 U.S.C. § 1132(a)(1)(B).

Both MetLife and Mobil based their denial of benefits, in the initial denial letter as well as in the denial on appeal, on interpretations of the terms "accident," "intentionally self-inflicted," "serious crime" and "while at work," as used in the separate AD&D policies. The plans did not define the terms "accident," "intentionally self-inflicted," or "serious crime," but did provide some clarification of the phrase "while at work."

If the language of an ERISA insurance policy is clear and unambiguous, then the language must be given its natural meaning. Burnham v. Guardian Life Ins. Co. of Am., 873 F.2d 486, 489 (1st Cir. 1989). As other courts have found in interpreting policies similar to those at issue here, the term "accident" is nothing but ambiguous. Mr. Justice Cardozo famously called misguided attempts to define it akin to plunging in a "Serbonian Bog." Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 499 (1934)(Cardozo, J., dissenting). Other courts have described the question as "one of the more philosophically complex simple questions" in the

law, Fegan v. State Mut. Life Assurance Co., 945 F. Supp. 396, 399 (D.N.H. 1996), or simply a "metaphysical conundrum[,]" Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1084 (1st Cir. 1990). The terms "intentionally self-inflicted," "serious crime," and "while at work" also lend themselves to more than one reasonable definition, and are therefore ambiguous as well.

The ambiguity of these contract terms precludes a "plain and ordinary meaning" interpretation of the contract and directs the Court to the federal common law that governs interpretation of an ERISA insurance plan. Pilot Life, 481 U.S. at 56. The federal common law of ERISA contract interpretation has incorporated state law principles as a way of accessing "common-sense canons of contract interpretation." Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580, 585 (1st Cir. 1993)(citing Bellino v. Schlumberger Technologies, Inc., 944 F.2d 26, 29 (1st Cir. 1991)). Courts are directed to construe insurance contracts liberally "in order to afford the protection which the insured was endeavoring to secure when he applied for the insurance." Wickman, 908 F.2d at 1084 (citations omitted). Nevertheless, "courts have no right to torture language in an attempt to force particular results or to convey delitescent nuances the contracting parties neither intended nor imagined." Burnham, 873 F.2d at 489.

What is an "accident"?

In the initial denial letter to Mrs. Stamp, MetLife explained why benefits could not be paid from the Basic and Voluntary AD&D policies in these terms:

> In the State of Rhode Island, a person is considered legally intoxicated and incapable of operating a motor vehicle if the blood alcohol level is .08 percent or higher. This is because alcohol impairs the drinker's judgment and physical and mental reactions. Here, Mr. Stamp's blood alcohol level was over 3 times the legal limit. The mental and physical impairments caused by excessive alcohol consumption are intentionally self-inflicted injuries that caused the death. In addition, the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan.

(MetLife Ex. D at 62.) In its denial of the subsequent appeal, Mobil offered a more elaborate explanation:

> Neither the SPD nor the underlying insurance policy defines the term "accident," and I am called upon to interpret that term.
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> In your appeal submission you argue that the weight of legal authority compels me to find that the collision in this case was an "accident" within the meaning of the plan. Counsel has reviewed these and other cases and advises that the weight of authority under applicable Federal law would not compel such a finding.
>
> Inasmuch as I am not bound by law, I look to the purpose of the plan. I believe that the purpose of the plan is to protect participants from risks that are outside of their control. The risks flowing from driving while intoxicated are completely within the control of the participant.

> While it is true that certain behavior that increases risk (such as skiing or horseback riding) would not result in loss of coverage, [driving while intoxicated] can be distinguished because it unreasonably increases the risk associated with a normally safe activity by interfering with an individual's ability to perceive and respond to risk. To impose the costs of such unreasonable risk-taking on the plan would result in unanticipated cost.

(Mobil Ex. B, Letter of October 15, 2004 at 2.) From these explanations, the Court understands that MetLife defines "accident" as an outcome that is not "reasonably foreseeable." Mobil's explanation seems to broaden the concept of "accident" to something that results from normally safe activity or even reasonable risk-taking behavior (such as skiing or horseback riding) but not something resulting from behavior, completely within the control of the insured, that unreasonably increases the risk involved in an activity. The Court's task in this case is to determine whether these definitions are reasonable as applied to Mr. Stamp's case.

The equation of "reasonably foreseeable" with "not accidental" that MetLife espoused in its denial was eschewed by the First Circuit in Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990). In that case, the First Circuit replaced a "reasonably foreseeable" test with a three-prong analysis designed to aid courts in determining whether a death was accidental within the meaning of ERISA-qualified AD&D policies. The first prong asks a court to consider "the reasonable expectations of the

insured when the policy was purchased." Wickman 908 F.2d at 1088. If the court determines that the insured did not expect an injury of the kind he suffered, the court must examine whether the suppositions underlying his expectations were reasonable, allowing for the personal characteristics and experiences of the insured. Id. Finally, if the court cannot determine the insured's subjective expectation, it must ask "whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Id.

This Court recently applied the Wickman analysis in a case strikingly similar to the one at bar. In Mullaney v. Aetna U.S. Healthcare, 103 F. Supp. 2d 486 (D.R.I. 2000), the beneficiary of an AD&D policy sought to recover benefits which had been denied her after her husband died in a single-car collision. The insured husband was found to have a blood alcohol level of 0.370% at the time of his death. His accidental death insurance policy similarly did not define the term "accident," and did not expressly exclude alcohol-related injuries. This Court concluded that, given the insured's extreme level of intoxication and the excessive speed of his driving, his death could not be an accident under Wickman. This writer reasoned that "[e]ven if Mr. Mullaney himself may not have intended or foreseen any harm in attempting to drive while grossly intoxicated, a reasonable person surely would have known that such conduct would likely result in serious bodily harm or death." Id. at 494.

Outside of this Circuit, there is a split in authorities on whether death from driving while intoxicated can be considered an accident under ERISA federal common law. Plaintiff offers several recent cases applying Wickman that find death as a result of driving while intoxicated to be accidental. One of the arguments asserted by those courts is that statistical evidence shows that the number of drunk driving deaths constitutes less than one percent of the number of people arrested for drunk driving, and that, therefore, a person is much more likely to be arrested while driving drunk than to be killed. See King ex. rel. Schanus v. Hartford Life and Accident Ins. Co., 357 F.3d 840, 844 (8th Cir. 2004) rev'd en banc on other grounds, 414 F.3d 994 (8th Cir. 2005); Lennon v. Metro. Life Ins. Co., 446 F. Supp. 2d 745, 751 (E.D. Mich. 2006); Eckelberry v. Reliastar Life Ins. Co., 402 F. Supp. 2d 704, 712 (S.D. W. Va. 2005) rev'd, --- F.3d --- , 2006 WL 3333747 (4th Cir. 2006); West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 903-04 (N.D. Iowa 2001). These courts reason further that, assuming more people drive while intoxicated than are arrested for it, these statistics show a person is even more likely to arrive home uninjured than be either arrested, injured, or killed.

Mark Twain famously quipped that "there are three kinds of lies: lies, damn lies, and statistics."[3] The statistics cited by the courts above are meaningless in this context. They do not consider the characteristics

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[3] In his autobiography, Twain attributes the phrase to Benjamin Disraeli, but Disraeli scholars dispute that the English Prime Minister ever wrote or spoke the phrase, so the Twain attribution stands.

of the driver, the type of road involved, the length of the fatal drive, how long the driver had been intoxicated, and most importantly, the degree of his intoxication. These factors appear to the Court to be crucial to a determination of whether the driver was so intoxicated as to make a fatal collision highly likely.

Defendants, in turn, cite to the courts who find the converse, namely, that deaths resulting from driving while intoxicated are not accidents. See Cozzie v. Metro. Life Ins. Co., 140 F.3d 1104, 1110 (7th Cir. 1998); Poeppel v. Hartford Life Ins. Co., 273 F. Supp. 2d 714, 720 (D.S.C. 2003); Sorrells v. Sun Life Assurance Co. Of Can., 85 F. Supp. 2d 1221, 1233-34 (S.D. Ala. 2000); Schultz v. Metro. Life Ins. Co., 994 F. Supp. 1419, 1422 (M.D. Fla. 1997); Nelson v. Sun Life Assurance Co. of Canada, 962 F. Supp. 1010, 1012 (W.D. Mich. 1997); Walker v. Metro. Life Ins. Co., 24 F. Supp. 2d 775, 781 (E.D. Mich. 1997); Fowler v. Metro. Life Ins. Co., 938 F. Supp. 476, 480 (W.D. Tenn. 1996); Cates v. Metro. Life Ins. Co., 14 F. Supp. 2d 1024, 1027 (E.D. Tenn. 1996), aff'd, 149 F.3d 1182 (6th Cir. 1998). These courts avoid statistical analyses of likelihood as a basis for determining whether death from driving while intoxicated is accidental; rather, they focus on the well-publicized nature of the dangers of driving while intoxicated and the logical connection between driving while impaired and serious injury. See, e.g., Sorrells, 85 F. Supp. 2d at 1233; Schultz, 994 F. Supp. At 1422.

It is worth noting that several of the cases cited by Defendants do not apply the Wickman test and affirm an insurer's use of the "reasonably foreseeable" test for "accident." See, e.g., Cozzie, 140 F.3d at 1109-10;

Cates, 14 F. Supp. 2d at 1027; Sorrells, 85 F. Supp. 2d at 1235. This Court, by contrast, is bound to follow Wickman and its interpretation in this Circuit to settle the question of whether Defendants' interpretation of the policy term "accident" is reasonable.

The first step of the Wickman analysis requires a court to attempt to ascertain the insured's actual expectations at the time he enrolled in the group policies, and whether he expected an injury similar to the one he suffered. 908 F.2d at 1088. This Court has no way of knowing, and no evidence has been adduced concerning, what Mr. Stamp's state of mind was at the time he signed up for the AD&D policies with regard to this kind of eventuality. While it appears from reports of conversations with his wife and friends the night of the accident that Mr. Stamp did not expect to die in a car collision, but rather expected to make it to his parents' house safely, the evidence is nonetheless insufficient to determine accurately the insured's subjective expectation. Therefore, the Court does not reach the second prong of the analysis, requiring it to determine whether the assumptions underlying Mr. Stamp's expectations were reasonable. Id. at 1088.

Wickman instructs that the final question the court must ask is "whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured's intentional conduct." Id. This objective portion of the Wickman test replaces "reasonably foreseeable" with "highly likely" as the determining characteristic of non-accidents.

The Court concludes that while death as a result of driving while intoxicated is not, as a matter of law, non-accidental, in this case, Mr. Stamp's blood alcohol level was so elevated that the intentional conduct of operating his car while so intoxicated was highly likely to result in the injury he did suffer. While it may be true that an intoxicated driver is more likely to arrive safely at home than to be arrested or injured, when compared with a sober driver, the highly intoxicated driver is many times more likely to be fatally injured. A driver who is over three times the legal limit of blood alcohol level, as Mr. Stamp was, is so impaired that, in this Court's view, he is likely to "pass out" or "black out" and cause a fatal collision to occur. As MetLife's Medical Department offered, Mr. Stamp's level of intoxication would cause in a sporadic drinker "lethargy, stupor, combativeness, incoherency and vomiting." (MetLife Ex. D at 119.) No evidence has been produced to show Mr. Stamp was anything more than a sporadic drinker, and therefore, the effects of the alcohol on him were likely those described by the MetLife Medical Department. Thus, while Mr. Stamp may have had every expectation of arriving at his parents' home safely, a reasonable person of similar background and characteristics would have viewed Mr. Stamp's conduct as highly likely to result in a fatal injury. For this reason, Defendants' determination that Mr. Stamp's death was not accidental is reasonable and supported by substantial evidence in the record.

Plaintiff argues that there is no evidence that Mr. Stamp's intoxication actually caused the accident, and that therefore, Defendants may not base the exclusion of Mr. Stamp's death from coverage on his blood

alcohol level. However, the policies at issue have no strict causation requirement; they merely require that the insured be "physically injured as a result of an accident." (Mobil Ex. A, 1997 SPD at 81.) Moreover, all indications point to Mr. Stamp's intoxication as the cause of his collision: there was light traffic and the road was dry at the time of the crash, there were no adverse road conditions, and no other car was involved in the wreck. Plaintiff speculates a steering failure or a blowout may have caused Mr. Stamp to crash, and offers that he may have been avoiding another car or an animal running across the road. No evidence has been submitted that would even suggest these alternative explanations, and the Court has no reason to conclude that anything but Mr. Stamp's intoxication caused the collision.

The Basic and Voluntary AD&D policies at issue in this case contain an exclusion for injuries that are "intentionally self-inflicted." The Voluntary and Occupational AD&D policies exclude death or injuries sustained while committing or attempting to commit a felony or other serious crime, or an assault. Moreover, the Occupational AD&D policy requires that the accident occur "while at work." Ultimately, these exclusions and narrowed coverage need not be interpreted by this Court. Because all three policies require that a death must be the result of an "accident," and this Court has determined that Defendants' denial of coverage based on the non-accidental nature of the insured's death from driving while severely intoxicated was reasonable, there is no need to reach those issues.

IV. Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's Cross-Motion for Summary Judgment is DENIED. The Clerk shall enter judgment for Defendants forthwith.

It is so ordered.

Ronald R. Lagueux
Senior United States District Judge
December 13, 2006